

FILED  
COURT OF APPEALS  
DIVISION II

06 OCT 23 AM 10:23

STATE OF WASHINGTON

NO. 35067-0

BY 

REPLY

---

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

---

PAUL M. MATHESON,

Appellant,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington; CINDI YATES, Director; GARY O'NEIL, Assistant Director; Washington State Department of Revenue; WASHINGTON STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL, Tobacco Tax Control Enforcement Program Manager; WASHINGTON STATE LIQUOR CONTROL BOARD; STATE OF WASHINGTON; CHAD R. WRIGHT, Cigarette Compact Department Administrator, Puyallup Tribe of Indians; and THE PUYALLUP TRIBE OF INDIANS.,

Respondents.

---

**BRIEF OF STATE RESPONDENTS**

---

ROB MCKENNA  
Attorney General

HEIDI A. IRVIN, WSBA #17500  
DAVID M. HANKINS, WSBA #19194  
Assistant Attorneys General  
Revenue Division  
P.O. Box 40123  
Olympia, WA 98504-0123  
(360) 753-5528

ORIGINAL

PM 10-20-06

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES.....	2
III.	STATEMENT OF THE CASE.....	2
	A. Background Facts.....	2
	1. Washington’s cigarette tax .....	3
	2. Legislation authorizing cigarette contracts with tribes.....	5
	3. The contract with the Puyallup Tribe .....	7
	B. Procedural History .....	7
IV.	ARGUMENT .....	12
	A. The Puyallup Tribe And Its Officer Are Immune From Suit In State Court And Have Not Waived Their Immunity.....	13
	B. The Trial Court Properly Exercised Its Discretion In Dismissing The Claims Against The State Defendants Under CR 19. ....	15
	1. The Tribe is a necessary party. ....	17
	2. In equity and good conscience, the claims against State Defendants cannot go forward in the absence of the Tribe. ....	19
	a. In actions involving contractual rights, all parties to the contract are indispensable. ....	20
	b. A judgment rendered in the Tribe’s absence would be highly prejudicial to the Tribe.....	21

c.	Prejudice to the Tribe cannot be reduced by provisions in the judgment. ....	24
d.	A judgment in the Tribe’s absence will not be adequate to Matheson. ....	26
e.	The absence of an alternative judicial forum does not require maintenance of this lawsuit. ....	27
3.	Dismissal of the State Defendants is consistent with Washington cases. ....	30
4.	The trial court committed no error in relation to Matheson’s proposed Second Supplemental Complaint because it has not yet ruled on the motion. ....	37
C.	This Court Has No Need To Consider Whether The Trial Court Acted Within Its Discretion In Denying Matheson’s Motion for Reconsideration Of The Dismissal Orders, Though It Certainly Did. ....	38
V.	CONCLUSION .....	39

## TABLE OF AUTHORITIES

### Cases

<u>American Greyhound Racing, Inc. v. Hull</u> , 305 F.3d 1015 (9 <sup>th</sup> Cir. 2002) .....	22, 24, 27, 28
<u>Arizona Public Service Co. v. Aspaas</u> , 77 F.3d 1128 (9 <sup>th</sup> Cir. 1995) .....	14
<u>Aungst v. Roberts Construct. Co.</u> , 95 Wn.2d 439, 625 P.2d 167 (1981).....	passim
<u>Bercier v. Kiga</u> , 127 Wn. App. 809, 103 P.3d 232 (2004), <u>review denied</u> , 155 Wn.2d 1015 (2005) .....	39
<u>Blodgett v. Orton</u> , 14 Wn.2d 270, 127 P.2d 671 (1942).....	21
<u>Coastal Bldg. Corp. v. City of Seattle</u> , 65 Wn. App. 1, 828 P.2d 7, <u>review denied</u> , 119 Wn.2d 1024 (1992).....	17, 18
<u>Cordova v. Holwegner</u> , 93 Wn. App. 955, 971 P.2d 531 (1999).....	32, 33
<u>Dawavendewa v. Salt River Agric. Improv. &amp; Power Dist.</u> , 276 F.3d 1150 (9 <sup>th</sup> Cir.), <u>cert. denied</u> , 537 U.S. 820 (2002) .....	passim
<u>Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel</u> , 883 F.2d 890 (10 <sup>th</sup> Cir. 1989) .....	28
<u>Ex parte Young</u> , 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).....	14
<u>Fluent v. Salamanca Indian Lease Authority</u> , 928 F.2d 542 (2d Cir.), <u>cert. denied</u> , 502 U.S. 818 (1991) .....	28
<u>Hardin v. White Mt. Apache Tribe</u> , 779 F.2d 476 (9 <sup>th</sup> Cir. 1985) .....	14

<u>In re Johns-Manville Corp.</u> , 99 Wn.2d 193, 660 P.2d 271 (1983).....	16, 17
<u>Lomayaktewa v. Hathaway</u> , 520 F.2d 1324 (9 <sup>th</sup> Cir. 1975), <u>cert. denied</u> , 425 U.S. 903 (1976)25, 27, 30	
<u>Matheson v. Liquor Control Bd.</u> , 132 Wn. App. 280, 130 P.3d 897 (2006).....	21
<u>North Sea Prods., Ltd. v. Clipper Seafoods Co.</u> , 92 Wn.2d 236, 595 P.2d 938 (1979).....	13
<u>Orwick v. Fox</u> , 65 Wn. App. 71, 828 P.2d 12, <u>review denied</u> , 120 Wn.2d 1014 (1992).....	16
<u>Panzer v. Doyle</u> , 271 Wis.2d 295, 680 N.W.2d 666 (Wis. 2004) .....	36, 37
<u>Plotkin v. State</u> , 64 Wn. App. 373, 826 P.2d 221, <u>review denied</u> , 119 Wn.2d 1022 (1992).....	13
<u>Puyallup Tribe, Inc. v. Dep’t of Game</u> , 433 U.S. 165, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977).....	13
<u>Rodriguez v. Wong</u> , 119 Wn. App. 636, 82 P.3d 263 (2004).....	13
<u>Saratoga County Chamber of Commerce Inc. v. Pataki</u> , 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y.), <u>cert.</u> <u>denied</u> , 540 U.S. 1017 (2003).....	35, 36, 37
<u>Suarez v. Newquist</u> , 70 Wn. App. 827, 855 P.2d 1200 (1993).....	14
<u>Town of Ruston v. City of Tacoma</u> , 90 Wn. App. 75, 951 P.2d 805, <u>review denied</u> , 136 Wn.2d 1003 (1998).....	16

<u>Trans-Canada Enterprises, Ltd. v. King County,</u> 29 Wn. App. 267, 628 P.2d 493, <u>review denied</u> , 96 Wn.2d 1002 (1981).....	33, 34, 35
<u>Treyz v. Pierce County,</u> 118 Wn. App. 458, 76 P.3d 292 (2003), <u>review denied</u> , 151 Wn.2d 1022 (2004).....	17, 18
<u>United States v. Oregon,</u> 657 F.2d 1009 (9 <sup>th</sup> Cir. 1981) .....	14
<u>Washington v. Confederated Tribes of the Colville Indian Reservation,</u> 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).....	26
<u>Wichita &amp; Affiliated Tribes of Okla. v. Hodel,</u> 788 F.2d 765 (D.C. Cir. 1986).....	20, 23, 28
<u>Wilbur v. Locke,</u> 423 F.3d 1101 (9 <sup>th</sup> Cir. 2005), <u>cert. denied</u> , ___ U.S. ___, 126 S. Ct. 1338 (2006).....	passim

### **Statutes**

Federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701-21 .....	35
Laws of 2001, ch. 235, §§ 1-3 .....	5
Laws of 2005, ch. 11, § 1 .....	6, 29
Laws of 2005, ch. 11, § 6.....	7
Puyallup Tribal Code Ch. 3.07 .....	7
RCW 43.06.450-.460 .....	5
RCW 43.06.455(4).....	5
RCW 43.06.455(5)(b) .....	5
RCW 43.06.460 .....	6

RCW 43.06.460(1).....	6
RCW 43.06.465 .....	6, 37
RCW 43.06.465(2).....	6
RCW 43.06.465(3).....	7
RCW 82.24.010(3).....	4
RCW 82.24.020 .....	3
RCW 82.24.027(1).....	3
RCW 82.24.028 .....	3
RCW 82.24.030 .....	3
RCW 82.24.030(5).....	5
RCW 82.24.040(2).....	3
RCW 82.24.090 .....	3
RCW 82.24.110(1).....	3
RCW 82.24.110(2).....	4
RCW 82.24.120-.180 .....	4
RCW 82.24.250 .....	3
RCW 82.24.250(7)(c) .....	4
RCW 82.24.250(8).....	5
RCW 82.24.260(1).....	4
RCW 82.24.260(4).....	5
RCW 82.24.295 .....	5

RCW 82.24.900 .....	4
RCW Ch. 82.24.....	4

### **Other Authorities**

K. Tegland, 3A <i>Washington Practice, Rules Practice</i> (2006).....	16, 21, 31
---	------------

### **Rules**

CR 12(b)(6).....	12
CR 19 .....	passim
CR 19(a).....	10, 16, 17
CR 19(b).....	passim
Fed. R. Civ. P. 19 .....	31
RAP 2.4(a) .....	12
RAP 2.4(c) .....	12
RAP 5.3(a) .....	12
RAP 7.2.....	11



## I. INTRODUCTION

This case concerns a Cigarette Tax Agreement entered into in 2005 between the Puyallup Tribe of Indians and the State of Washington, under which the parties agreed the Tribe would impose its own tribal tax on cigarettes in lieu of the existing state taxes. Appellant Paul Matheson is a member of the Puyallup Tribe and a cigarette retailer on trust land on the Puyallup reservation. He filed a lawsuit in the Thurston County Superior Court challenging the validity of the Agreement and its authorizing legislation. In his action he named as defendants the Puyallup Tribe, tribal officer Chad Wright, the State of Washington, including two state agencies, and several state officials, including Governor Gregoire.

Despite the impression Matheson's opening brief creates, this Court will have no need to reach the merits of the claims set forth in Matheson's Complaint. This is because the trial court dismissed the claims against defendants in two separate orders without reaching the merits. The trial court dismissed the Puyallup Tribe and its officer on sovereign immunity grounds, and it then dismissed the action under Civil Rule 19 because it considered the Tribe so indispensable that the action could not proceed in the Tribe's absence. Accordingly, the briefing that follows will focus on the trial court's grounds for dismissing Matheson's

claims and why the trial court was correct in entering the dismissal orders.<sup>1</sup>

## **II. ISSUES**

1. Did the trial court properly dismiss Matheson's claims against the Tribal Defendants on the grounds of sovereign immunity?

2. Under CR 19, did the trial court abuse its discretion in dismissing Matheson's claims against State Defendants, all of which sought to invalidate or avoid the effect of the Cigarette Tax Agreement or its authorizing legislation, on the ground that such claims could not in equity and good conscience proceed in the absence of the Puyallup Tribe?

## **III. STATEMENT OF THE CASE**

### **A. Background Facts**

Matheson is a member of the Puyallup Tribe and a cigarette retailer on the Puyallup reservation. CP 5 (Complaint ¶ 2). Before the Cigarette Tax Agreement went into effect in 2005, Matheson's business activities as a cigarette retailer would have been subject to state regulation to the extent he sold cigarettes to non-Indians and Indians who were not members of the Puyallup Tribe. This is because those sales would have

---

<sup>1</sup> Although the State Defendants do not reach the merits of Matheson's legal theories or factual allegations, that should not be misconstrued as a concession that his claims, if reached, would have any merit. The briefing before the trial court on the Tribe's motion for dismissal and Matheson's motion for a preliminary injunction demonstrates the weaknesses in many of Matheson's legal theories. See CP 251-64; CP 411-21; CP 426-30; CP 569-89.

been subject to Washington's cigarette tax and state and local sales and use taxes.

**1. Washington's cigarette tax**

The State of Washington imposes an excise tax on cigarettes sold, used, consumed, handled, possessed or distributed within its borders. RCW 82.24.020; 82.24.027(1); 82.24.028. The State collects this tax through the sale of cigarette stamps, which must be affixed to all packages of cigarettes possessed within the state that have not been preapproved for tax exemption. RCW 82.24.030. Wholesalers and certain retailers must maintain records showing "all transactions" relating to the purchase and sale of cigarettes. RCW 82.24.090. Only Washington-licensed wholesalers may possess unstamped cigarettes, and then only under specified circumstances. RCW 82.24.040(2). Transportation of unstamped cigarettes in Washington is generally prohibited, except as set forth in RCW 82.24.250, which requires notice to the Liquor Control Board.

The Legislature declared a number of actions to be gross misdemeanors and punishable as such (e.g., retailing cigarettes without stamps first being affixed). RCW 82.24.110(1). Knowingly transporting in excess of 60,000 cigarettes without proper stamps is a Class C felony unless notice is given to the State and other requirements are met. RCW

82.24.110(2). The Legislature also gave the Department of Revenue authority to impose monetary penalties for violations of RCW Ch. 82.24 and set forth procedures for seizure and forfeiture of contraband material and vehicles used for transporting the material. RCW 82.24.120-.180.

Certain persons are exempt from the requirement to prepay the cigarette tax or affix stamps to cigarettes, including:

- (b) A federal instrumentality with respect to sales to authorized military personnel; or
- (c) An Indian tribal organization with respect to sales to enrolled members of the tribe.

RCW 82.24.260(1) (emphasis added); see also RCW 82.24.010(3) (defining “Indian tribal organization”). In other words, the statutory exemption for sales by Indian tribal organizations to its own enrolled members does not extend to sales by an Indian tribal organization to non-Indians or to Indians who are not members of that tribe. See also RCW 82.24.250(7)(c) (allowing an Indian tribal organization to possess unstamped cigarettes under specified circumstances). In addition, the cigarette tax statutes “shall not apply” if the State is prohibited from taxing under the federal or state constitutions or federal statutes. RCW 82.24.900.

A final exception to the notice, stamping, and cigarette tax requirements is the exception for cigarettes subject to lawful transactions

covered by cigarette tax contracts between specified Indian Tribes and the State under RCW 43.06. See RCW 82.24.030(5) (exception to stamping requirement); RCW 82.24.250(8) (transportation of unstamped cigarettes); RCW 82.24.260(4) (selling unstamped cigarettes); RCW 82.24.295 (sales by Indian retailer under cigarette tax contract).

## **2. Legislation authorizing cigarette contracts with tribes**

In 2001, the Legislature authorized the Governor to enter into cigarette tax contracts with eligible tribes, under which a tribe could impose its own cigarette tax in lieu of the State's cigarette tax, and state and local sales and use taxes, and use the resulting tax revenue for essential government services. Laws of 2001, ch. 235, §§ 1-3 (codified as RCW 43.06.450-.460). Under such contracts, retailers may purchase cigarettes only from certain sources, including wholesalers licensed in Washington or out-of-state wholesalers who "agree to comply with the terms of the cigarette tax contract" and "are certified to the state as having so agreed . . . ." RCW 43.06.455(5)(b). Rather than a State cigarette tax stamp, cigarettes sold under the terms of a contract between a tribe and the State must bear a tribal stamp. RCW 43.06.455(4).

The Puyallup Tribe was not included in the original list of tribes with whom the Governor could enter into a cigarette tax agreement "due to the very different nature of the cigarette trade" on the reservation. Laws

of 2005, ch. 11, § 1. However, the Legislature enacted special legislation regarding the Puyallup Tribe in 2005, under which the Governor could enter into an agreement with the Tribe that was distinctly different from agreements with other tribes in two major respects.

The first difference relates to the amount of the new tribal tax. The tribal tax rate imposed under agreements with the eligible tribes listed in RCW 43.06.460 must, within three years, equal one hundred percent of the total state cigarette and state and local sales and use taxes. RCW 43.06.460(1). In contrast, the Legislature authorized a contract with the Puyallup Tribe to provide for a tax of \$11.75 per carton (about 87% of the state cigarette tax rate at the time of enactment), with increases or decreases in lockstep with any increases or decreases in the state cigarette tax. RCW 43.06.465(2). In other words, a tribal tax imposed in lieu of state taxes under an agreement with the Puyallup Tribe would be lower than a tribal tax imposed by other tribes under a similar agreement.

The second major difference between the statutes authorizing tax agreements with other tribes and RCW 43.06.465, authorizing an agreement with the Puyallup Tribe, is a provision for revenue sharing. Any agreement with the Puyallup Tribe requires the Tribe to give thirty percent of the tribal tax revenue to the State on a quarterly basis. RCW

43.06.465(3). No revenue sharing is required under the cigarette tax contracts between the State and other tribes.

### **3. The contract with the Puyallup Tribe**

The State and the Puyallup Tribe reached an agreement in principle on the terms of a cigarette tax contract in January 2005. Hence, the 2005 legislation authorizing the agreement was effective immediately, April 5, 2005. Laws of 2005, ch. 11, § 6.

Governor Gregoire and the Chairman of the Puyallup Tribe signed the Cigarette Tax Agreement Between the Puyallup Tribe of Indians and the Department of Revenue (“Agreement”) on April 20, 2005. CP 692 (attached as Appendix 1). Shortly thereafter, the Puyallup Tribe passed the necessary ordinances to effectuate the terms of the Agreement. See Puyallup Tribal Code Ch. 3.07. (Attached as Appendix 2.)

### **B. Procedural History**

On May 10, 2005, Paul Matheson filed a Complaint for Injunctive Relief, Declaratory Judgment and Damages for Civil, Constitutional and RICO Violations (“Complaint”). CP 4-42. He named as defendants the Puyallup Tribe of Indians and tribal official Chad Wright (collectively “Tribal Defendants”); and Governor Christine Gregoire, state officials Cindi Yates, Gary O’Neil, and M. Carter Mitchell, the Washington State

Department of Revenue, the Washington State Liquor Control Board, and the State of Washington (collectively “State Defendants”).

The essence of the Complaint is that Matheson objects to the cigarette tax enacted by the Puyallup Tribe in accordance with the terms of the Agreement and the legislation authorizing the State to enter into the Agreement. As Matheson’s opening brief illustrates, he has a variety of theories, based on alleged violations of state and federal statutes, state and federal constitutional provisions, Indian treaties, and common law principles, from which he argues that the State and the Tribe should not have contracted regarding cigarette taxes.

On June 10, 2005, the State Defendants filed and served their Answer and Affirmative Defenses to the Complaint. CP 698-709. Matheson’s next significant action in the case was to file a motion for a preliminary injunction on August 31, 2005. CP 537-49 (motion); CP 432-536 (brief in support); CP 550-57 (affidavits in support); CP 590-93 (reply in support). In the motion, Matheson sought eight different types of injunctive relief against the State Defendants, mostly related to his own business. CP 539-42.<sup>2</sup> The defendants opposed the motion, and the trial court entered an order on December 23, 2005, denying Matheson’s

---

<sup>2</sup> For instance, Matheson sought to preclude the State Defendants from “[o]btaining any records o[f] sales on purchases of any of Plaintiff’s sales at retail on the Puyallup Indian reservation.” CP 540.



motion. CP 558-68 (Tribal Defendants' opposition); CP 569-89 (State Defendants' opposition); CP 594-95 (order denying motion). Matheson filed a motion for reconsideration, but the trial court denied that also, in January 2006. CP 115-159 (motion for reconsideration); CP 596-606 (State Defendants' opposition); CP 160-61 & CP 607-08 (letter ruling denying motion).

In the meantime, the Tribal Defendants had filed a motion for dismissal in June 2005, but due to various scheduling problems, the motion was not heard until December 2005. The Tribal Defendants moved for dismissal on three alternative bases: (a) the Tribe's sovereign immunity protected them from suit, depriving the state court of personal jurisdiction over them; (b) the trial court also lacked subject matter jurisdiction over them; and (c) the Complaint failed to state a claim against them for which relief could be granted. CP 238-39 (motion); CP 240-64 (brief in support); CP 265-68 (State Defendants' joinder); CP 422-31 (Tribal Defendants' reply in support); CP 411-21 (State Defendants' reply in support). The trial court granted the Tribal Defendants' motion to dismiss over Matheson's objection, giving an oral ruling on December 23, 2005, and entering the dismissal order on May 26, 2006. CP 279-410 (Matheson's opposition); CP 635-39 (order granting dismissal). Although the Tribal Defendants had offered alternative grounds for their motion, the

trial court granted it solely on the basis of sovereign immunity, and it did not reach the other issues. CP 635-39.

After the trial court gave its oral ruling dismissing the Tribal Defendants, the State Defendants filed their own motion for dismissal based on Civil Rule 19. CP 162-74 (motion); CP 622-32 (reply in support). State Defendants argued that the Tribe was needed as a party for just adjudication under CR 19(a) and that the Tribe was “indispensable” under CR 19(b), such that the action should not proceed between Matheson and the State Defendants. CP 163-73. Matheson opposed the motion, relying for the most part on the same arguments he makes on appeal in Parts B and C of his opening appellate brief. CP 609-21. The trial court granted the motion to dismiss on May 26, 2006. CP 633-34.

Matheson moved for reconsideration of both of the dismissal orders, and after receiving briefing, the trial court denied the motion for reconsideration on June 9, 2006, without a hearing. CP 209-10 (order denying reconsideration); 640-46 (State Defendants’ opposition).<sup>3</sup>

Before his motion for reconsideration was decided, Matheson sought to avoid the effect of the order dismissing the claims against the State Defendants by filing a motion for permission to file a “Second Supplemental Complaint for Refund of Cigarette Taxes and Master

---

<sup>3</sup> Matheson has not designated his motion for reconsideration as part of the clerk’s papers.

Settlement Act Assessments” (“Second Supplemental Complaint”).<sup>4</sup> CP 710-12 (motion); CP 175-208 (proposed supplemental complaint).

Matheson noted this latest motion for July 7, 2006. The State Defendants filed an opposition brief, arguing that Matheson’s attempt to supplement his complaint was untimely and futile, and that the proposed Second Supplemental Complaint failed to comply with general rules of pleading. CP 647-92.

Inexplicably, on July 6, 2006, one day before the scheduled trial court hearing on Matheson’s new motion to supplement his complaint, Matheson filed his Notice of Appeal. CP 211-15. In court the next day for the scheduled hearing, the parties agreed that Matheson’s action in filing the Notice of Appeal precluded the trial court from ruling on the motion to supplement the complaint. See RAP 7.2. They agreed, as did the trial court, that the motion could not be decided until after this Court issues a decision on the appeal. The parties entered a Stipulation to that effect. CP 693-94; see also CP 216 (clerk’s minute entry).

The order denying reconsideration of the two dismissal orders is the only order or ruling mentioned in Matheson’s Notice of Appeal. CP

---

<sup>4</sup> The reason Matheson termed his new proposed pleading a “Second Supplemental Complaint” is that at the beginning of the case, but after the State Defendants had filed an answer, Matheson filed a “First Amended and Supplement Complaint.” CP 43-114. For several reasons, the State Defendants objected and moved to strike the First Amended and Supplement Complaint. CP 224-37. The trial court granted the motion. CP 277-78.

211-15. Since the order relates directly to the trial court's orders granting dismissal of claims against the Tribal Defendants and the State Defendants, the trial court's grounds for those dismissal orders should define the scope of this appeal. See RAP 2.4(c); RAP 5.3(a). Accordingly, this Court has no need to consider questions outside (a) the effect of tribal sovereign immunity on claims against the Tribal Defendants; and (b) whether the trial court properly dismissed claims against the State Defendants under CR 19. Most of Matheson's opening brief (and assignments of error) addresses issues the trial court never reached.<sup>5</sup> Hence, no review of a trial court decision is possible, and no consideration of those arguments issues by this Court is appropriate, except as the nature of the claims informs the Court regarding factors relevant to a CR 19 dismissal. See RAP 2.4(a).

#### **IV. ARGUMENT**

The trial court had no choice but to dismiss the Puyallup Tribe, and it properly dismissed tribal official Chad Wright, on grounds of sovereign immunity. Moreover, the trial court's dismissal of claims against the State Defendants under CR 19 was the correct decision and well within the

---

<sup>5</sup> The following portions of Matheson's opening appellate brief address issues not decided by the trial court: Assignment of Error Nos. 1, 3 (first two sentences concerning the Supplemental Complaint), 5, 6, 7, and 8; Argument Parts A (to the extent it seems to be a CR 12(b)(6) argument), E-L, and M (concerning the Supplemental Complaint).

court's discretion. Nothing Matheson argues on appeal shows error or compels a different result. The trial court's dismissal orders and the order denying reconsideration of the dismissals should be affirmed.

**A. The Puyallup Tribe And Its Officer Are Immune From Suit In State Court And Have Not Waived Their Immunity.**

Whether the Puyallup Tribe and its official Chad Wright are immune from suit in this action is a question of law, which this Court reviews de novo. See Rodriguez v. Wong, 119 Wn. App. 636, 639-40, 82 P.3d 263 (2004); Plotkin v. State, 64 Wn. App. 373, 378-79, 826 P.2d 221, review denied, 119 Wn.2d 1022 (1992). This Court should affirm the trial court's order dismissing the Tribal Defendants based on sovereign immunity from suit. Matheson's opening brief offers no argument or legal authority to the contrary.

Absent waiver, consent, or Congressional authorization, a state court may not exercise personal jurisdiction over a recognized Indian tribe. North Sea Prods., Ltd. v. Clipper Seafoods Co., 92 Wn.2d 236, 238, 595 P.2d 938 (1979) (quoting Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977)). The Puyallup Tribe is a federally recognized Indian tribe, and its actions in entering into the Agreement do not constitute a waiver or consent to be named as a defendant in a state court action challenging the Agreement. In fact, the

Agreement contains a non-waiver provision: “Nothing in this Agreement shall be construed as a waiver, in whole or in part, of either party’s sovereign immunity.” CP 679; Appendix 1 at 2.

The trial court also properly dismissed Chad Wright, who is the Director of the Tribe’s Cigarette Tax Department. CP 245 lines 9-10; see also CP 12 at ¶ 21 (Complaint). Mr. Wright was named only in his official capacity. CP 12 at ¶ 23. Washington follows federal law in extending tribal immunity to tribal officers acting in their official capacity and within the scope of their authority. Suarez v. Newquist, 70 Wn. App. 827, 831-32 n.7, 855 P.2d 1200 (1993) (citing Hardin v. White Mt. Apache Tribe, 779 F.2d 476, 479 (9<sup>th</sup> Cir. 1985); United States v. Oregon, 657 F.2d 1009, 1012 n.8 (9<sup>th</sup> Cir. 1981)).

The Ninth Circuit has relied on the Ex parte Young doctrine to allow suits against tribal officials, in addition to state officials, in cases seeking merely prospective relief, when the tribal official has acted pursuant to an unconstitutional statute. See Dawavendewa v. Salt River Agric. Improv. & Power Dist., 276 F.3d 1150, 1159-61 (9<sup>th</sup> Cir.), cert. denied, 537 U.S. 820 (2002); Arizona Public Service Co. v. Aspaas, 77 F.3d 1128, 1133-34 (9<sup>th</sup> Cir. 1995); Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). However, it has applied sovereign immunity when the requested relief will require “affirmative actions by

the sovereign or disposition of unquestionably sovereign property,” even if the officer being sued has acted unconstitutionally. Dawavendewa, 276 F.3d at 1160. Matheson’s Complaint, however, fails to allege any specific action by Chad Wright at all or to seek any relief specific to him, and therefore he raises and preserves no argument that would fit this exception. Moreover, Matheson seeks not just prospective relief, but also damages, taking him outside this exception. CP 38-41 (requesting declaratory relief, injunctive relief, and damages).

In sum, Matheson’s claims against Chad Wright are de facto claims against the Puyallup Tribe. Because the relief would operate against the Tribe, Matheson’s claims against Mr. Wright are barred by sovereign immunity. See Dawavendewa, 276 F.3d at 1161 (rejecting attempt to circumvent the Navajo Nation’s sovereignty by joining tribal officials where relief requested would operate against the Nation as a signatory to a lease). The trial court correctly dismissed both the Tribe and Mr. Wright from this action.

**B. The Trial Court Properly Exercised Its Discretion In Dismissing The Claims Against The State Defendants Under CR 19.**

Civil Rule 19 governs the joinder of parties needed for just adjudication. The trial court’s dismissal of the Puyallup Tribe from this action gave rise to a new issue; i.e., whether the case should proceed in the

Tribe's absence against the State Defendants. Analysis under CR 19 required two determinations: (1) Whether the Tribe was needed for just adjudication of the claims against the State Defendants under CR 19(a), and (2) if the Tribe was needed, whether it was indispensable under CR 19(b) so that in equity and good conscience the case should not proceed among the remaining parties. See In re Johns-Manville Corp., 99 Wn.2d 193, 197, 660 P.2d 271 (1983); Wilbur v. Locke, 423 F.3d 1101, 1111-12 (9<sup>th</sup> Cir. 2005), cert. denied, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1338 (2006).

The standard of review for trial court decisions under CR 19 is abuse of discretion, except to the extent CR 19(a) mandates joinder.<sup>6</sup> See Town of Ruston v. City of Tacoma, 90 Wn. App. 75, 82, 951 P.2d 805, review denied, 136 Wn.2d 1003 (1998); Orwick v. Fox, 65 Wn. App. 71, 80, 828 P.2d 12, review denied, 120 Wn.2d 1014 (1992); K. Tegland, 3A *Washington Practice, Rules Practice* at 420 (2006) ("the trial court has discretion to determine whether to continue the litigation or to dismiss"). Most reported appellate decisions in Washington addressing CR 19, however, do not mention any standard of review. See, e.g., Aungst v. Roberts Construct. Co., 95 Wn.2d 439, 625 P.2d 167 (1981). Regardless of what standard of review is applied here, the trial court properly dismissed the claims against the State Defendants.

---

<sup>6</sup> CR 19(a) provides that if a necessary party has not been joined, "the court shall order that he be made a party."



**1. The Tribe is a necessary party.**

Civil Rule 19(a) requires the plaintiff to join any person who is subject to service of process and satisfies any one of three requirements. The Puyallup Tribe meets the definition of a necessary party in subsection (a)(2)(A) of the Rule:

[The person] claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest . . . .

Washington courts have confirmed that “a necessary party is one whose ability to protect its interest in the subject matter of the litigation would be impeded by a judgment. . . . The party must have a sufficient interest such that a judgment cannot be determined without affecting that interest.” Treyz v. Pierce County, 118 Wn. App. 458, 462-63, 76 P.3d 292 (2003) (citations omitted), review denied, 151 Wn.2d 1022 (2004); see also In re Johns-Manville Corp., 99 Wn.2d at 197 (a person is a necessary party if it has a clear interest in the subject matter of the litigation that may be difficult to protect, and which may also affect the interests of the remaining parties); Coastal Bldg. Corp. v. City of Seattle, 65 Wn. App. 1, 5, 828 P.2d 7 (a person is a necessary party if it has “a substantial legal right that would be affected” if the requested relief is granted), review denied, 119 Wn.2d 1024 (1992).

Matheson's central goal in this case is to obtain a determination invalidating the Agreement, the tribal taxes, and the implementing state laws. For example, two of his requests for relief seek a determination that the Agreement (or any other contract) between the State and the Tribe is invalid and ineffective against him. CP 39-40 ¶¶ B & F.

The Tribe easily meets the definition of a necessary party. The Tribe's absence as a practical matter impairs or impedes its ability to protect its interest, which is to see that the Agreement is upheld. See, e.g., Treyz, 118 Wn. App. at 464 (current district court judges in county are necessary parties to action by part-time district court judge whose position was eliminated by county ordinances consolidating district courts where current judges were elected pursuant to challenged ordinances); Coastal Bldg., 65 Wn. App. at 5 (adjoining property owner was a necessary party to action by contract purchaser and seller of neighboring vacant lot challenging hearing examiner's decision that the lot was not a legal building site where adjoining property owner had a legal right to park on a vacant lot).

In a case nearly on all fours with this case, the Ninth Circuit held that the Swinomish Tribe was a necessary party to an action by a family of tribal retailers challenging a similar cigarette tax agreement under RCW 43.06 between the Swinomish Tribe and the State of Washington. Wilbur,

423 F.3d at 1112-14. The Swinomish Tribe had not been named in the lawsuit, but the court found both that the Tribe had a legally protected interest and that disposition of the case in the Tribe's absence might impair or impede the Tribe's ability to protect that interest. Id. at 1112.

The court explained:

If the Compact is invalidated, the State would be released from its contractual obligation to refrain from taxing cigarette sales by Indian retailers to non-Indians and non-Tribe members. If the State resumed imposing such taxes, the Tribe would be forced to choose between double-taxing its own retailers or foregoing tax revenue for essential government services.

Id. at 1113. The Puyallup Tribe is in an indistinguishable position.

Without question, the Tribe meets the definition of a necessary party under CR 19(a) for the purposes of Matheson's Complaint.

**2. In equity and good conscience, the claims against State Defendants cannot go forward in the absence of the Tribe.**

By ruling the Puyallup Tribe immune from suit in state court, the trial court concluded the Tribe cannot be joined as a party in this case. If a necessary person cannot be made a party, CR 19(b) requires courts to "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." CR 19(b). To guide the

courts in making the determination, subsection (b) lists four factors the courts should examine:

(1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

CR 19(b).

The four factors are to be weighed in light of the interests presented in the particular case. Aungst, 95 Wn.2d at 443. The four factors “are not rigid, technical tests,” but rather guides to the overarching question of whether absence of a person from the case requires dismissal of the case against other parties as a matter of equity and good conscience. Wichita & Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 774 (D.C. Cir. 1986). Consideration of these and other factors here demonstrates that this case should not proceed against the State Defendants in the Tribe's absence.

**a. In actions involving contractual rights, all parties to the contract are indispensable.**

Under Washington law, “[i]n actions involving contractual rights, all parties to the contract are indispensable.” Aungst, 95 Wn.2d at 443. This principle has been the law in Washington for many decades. See

Blodgett v. Orton, 14 Wn.2d 270, 274, 127 P.2d 671 (1942) (court is precluded from rendering a judgment canceling a note unless all persons with an interest in the note are parties); cf. K. Tegland, 3A *Washington Practice, Rules Practice* at 422 (2006) (“It has generally been held that any party whose rights might be affected by the litigation must be joined in an action for specific performance or for cancellation of instruments.”)

The Ninth Circuit’s decision in Wilbur also reaffirmed the “fundamental principle” that a party to a contract is necessary, and if not subject to joinder, indispensable “to litigation seeking to decimate that contract.” Id. at 1113 (quoting Dawavendewa, 276 F.3d at 1157, and citing multiple federal cases). This consideration alone strongly supports dismissal of the claims against the State Defendants in the Tribe’s absence.

**b. A judgment rendered in the Tribe’s absence would be highly prejudicial to the Tribe.**

Matheson seeks a ruling invalidating the Agreement between the Tribe and the State. Such a ruling would once again subject Tribal members (including Matheson) to State regulation and enforcement of its cigarette and sales taxes regarding sales on the reservation to non-Indians and non-Tribal members, and possible federal criminal prosecution. See Matheson v. Liquor Control Bd., 132 Wn. App. 280, 130 P.3d 897 (2006)

(rejecting claim for return of 41,700 packs of unstamped cigarettes seized by the Washington State Patrol in Kittitas County en route from Idaho to Western Washington). It would also eliminate the Tribe's tax revenue and funds for essential government services.

Furthermore, prejudice is presumed in actions involving contract rights. See Aungst, 95 Wn.2d at 444 ("A judgment of rescission rendered in the absence of the club or the Tribe would obviously prejudice their rights under the membership contracts.")

In Wilbur, the court indicated that prejudice to the Swinomish Tribe stems from the same impairment of legal interests that made the tribe a necessary party under Rule 19(a). It also stated: "If the Compact is invalidated in the Tribe's absence, the Tribe will be prejudiced to a great extent." 423 F.3d at 1114. Likewise, the Ninth Circuit concluded in a case concerning gaming contracts between the State of Arizona and tribes that "[t]he amount of prejudice to the tribes from termination of existing compacts and inability to enter new ones would be enormous." American Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1025 (9<sup>th</sup> Cir. 2002). In a case challenging employment preferences contained in a lease between a regional power district operating on reservation lands with the Navajo Nation, the Ninth Circuit also found the Nation indispensable based in part on prejudice:

A decision rendered in this case prejudices the Nation's economic interests in the lease with SRP, namely its ability to provide employment and income for the reservation. A decision so rendered would also prejudice the Nation's sovereign interests in negotiating contractual obligations and governing the reservation.

Dawavendewa, 276 F.3d at 1162.

Matheson suggests that his claims against the State Defendants should not have been dismissed because the Tribe indicated to the trial court it was willing to make its positions known in amicus filings after dismissal. Brief of Appellant at 18. The trial court did not rule on that offer because it was never presented in any formal manner to the court. Even if it had, however, allowing an immune party to provide input to ongoing litigation through amicus filings does not eliminate prejudice. A federal appeals court in a case involving the Wichita Tribe and Rule 19 explained:

If the opportunity to brief an issue as a non-party were enough to eliminate prejudice, non-joinder would never be a problem since the court could always allow the non-joinable party to file amicus briefs. Being party to a suit carries with it significant advantages beyond amicus' opportunities, not the least of which is the ability to appeal a judgment.

Wichita & Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 775 (D.C.

Cir. 1986).

A judgment entered in this action invalidating the Agreement or its authorizing legislation would be highly prejudicial to the Tribe. Accordingly, this factor favors dismissal of the claims against the State Defendants.

**c. Prejudice to the Tribe cannot be reduced by provisions in the judgment.**

In this case, prejudice to the Tribe from a judgment against the State cannot be reduced by any protective provisions in the judgment. Matheson's Complaint requests relief that poses an all-or-nothing issue: either the Agreement is valid or it is not. There are no in-between measures that could modify the impact of a judgment.

As the court stated in Wilbur:

As to the second test, it is not possible to lessen or avoid any prejudice by the shaping of relief or protective provisions in the judgment. The Wilburs want nothing less than nullification of the Compact.

423 F.3d at 1114; see also Dawavendewa, 276 F.3d at 1162 (finding no relief to mitigate the prejudice where any decision satisfying the plaintiff would prejudice the Nation in its contract with a regional power district and its governance of the tribe); American Greyhound, 305 F.3d at 1025 (no shaping of relief available where termination of existing contracts was central to the litigation); Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326 (9<sup>th</sup> Cir. 1975) (no available protective measures to mitigate prejudice to



Hopi Tribe in action to void lease of Indian land to coal-mining company; plaintiffs were attempting to deprive Tribe of tens of millions of dollars under the lease), cert. denied, 425 U.S. 903 (1976).

Matheson implies that because his Complaint includes allegations that the State and the Tribe committed antitrust violations under state and federal law, the trial court should have allowed him to proceed against the State on those claims and awarded him damages. Brief of Appellant at 10. This argument fails to address the CR 19 issue because no court can conclude that the arrangement between the State and the Tribe somehow constitutes an antitrust violation without in the process invalidating the Agreement. In addition, he fails to note that the existence of Sherman Antitrust claims in Wilbur did not stop the Ninth Circuit from concluding that protective measures were not available. See Wilbur, 423 F.3d at 1105.

The goal of Matheson's suit is to invalidate the Agreement and stop both the Tribe and the State from "interfering" with his business. He may have chosen to pursue his goal under dozens of theories, but the core of what he seeks is plain. This factor therefore strongly favors dismissal of the claims against the State Defendants given the Tribe's absence from the case.

**d. A judgment in the Tribe's absence will not be adequate to Matheson.**

The third factor to consider under CR 19(b) is whether a judgment rendered in the nonjoinable party's absence will be adequate. This factor also does not favor Matheson.

Ironically, a judgment in Matheson's favor, in the absence of the Tribe, will not be adequate from his perspective. A ruling invalidating the Agreement would leave untouched the Tribe's independent sovereign authority to impose its current cigarette tax on Matheson's sales. The United States Supreme Court has on multiple occasions ruled that Indian tribes have power to tax transactions occurring on trust lands as a fundamental attribute of their sovereignty, unless divested of that power by federal law or otherwise. See Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980). Therefore, Matheson would not necessarily accomplish his purpose of freeing his business from a Tribal tax, even if he had a successful theory against the State Defendants in this case.

In addition, the Ninth Circuit cases concerning contracts where tribes are parties do not consider any judgment "adequate" where the tribes' protectible interests remain impaired. See Wilbur, 423 F.3d at 1114-15 (third test does not favor Wilburs because if the Compact is

invalidated, the Tribe's protectible interests would be impaired); American Greyhound, 305 F.3d at 1025 (third factor does not favor plaintiffs where injunctive relief affecting gaming contracts would impair tribes' protectible interests); Dawavendewa, 276 F.3d at 1162 (no partial relief adequate where any injunctive relief necessarily results in prejudice to Nation and regional utility district); Lomayaktewa, 520 F.2d at 1326 (judgment in Tribe's absence not adequate where adverse effects of invalidation of lease will be visited upon the Tribe).

Because a judgment in Matheson's favor will not eliminate the Tribe's ability to impose a cigarette tax scheme on him, and because such a judgment will otherwise be prejudicial to the Tribe's interest under any of the relief Matheson seeks, this third factor supports dismissal of this action.

**e. The absence of an alternative judicial forum does not require maintenance of this lawsuit.**

The fourth factor courts consider under CR 19(b) is whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Matheson may have no alternative judicial forum in which to pursue this action if it is dismissed.<sup>7</sup> While this factor favors Matheson, it does not outweigh the other factors and the case should still be dismissed.

---

<sup>7</sup> The State Defendants would have a sovereign immunity defense if named in an action filed in Tribal Court.

No court would lightly make a decision to dismiss a case and leave a party without a remedy. And the State Defendants are not suggesting that in every case in which an Indian tribe has an interest in litigation, the case cannot proceed in the absence of the tribe. Here, however, the nature of the respective interests of the parties compels the conclusion that the action should be dismissed because of the Puyallup Tribe's absence from the case.

Analogous federal cases have emphasized that Indian tribes' sovereign immunity is a consideration that outweighs the four factors normally examined under Rule 19(b). See Wilbur, 423 F.3d at 1115; American Greyhound, 305 F.3d at 1025. There is a "paramount importance accorded the doctrine of sovereign immunity under rule 19." Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542, 548 (2d Cir.), cert. denied, 502 U.S. 818 (1991). In the words of another court:

[W]hen a necessary party is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves.

Wichita, 788 F.2d at 777 n.13 (internal quotations and citations omitted); accord Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel, 883 F.2d 890, 894 (10<sup>th</sup> Cir. 1989).

Here, the Court need not rule that the Tribe's sovereign immunity alone determines that Matheson's claims should not proceed against the State Defendants. It is the fact of the Tribe's sovereign immunity along with the competing interests of Matheson and the parties to the Agreement that compel dismissal of Matheson's claims. This is not a case concerning a personal or common commercial contract. Rather, it is a case concerning the right and ability of two independent sovereigns to fulfill their governmental functions of imposing taxes, raising revenue, and providing services for their citizens. In the legislation approving a cigarette tax agreement with the Puyallup Tribe, the Legislature set forth the other considerations supporting cigarette tax agreements between the State and tribes:

The legislature further finds the agreements resolved decades of conflict between the state and tribes over the sale of contraband cigarettes to non-Indians; benefited the tribes through tribal tax revenues; benefited the state because cigarettes are stamped and taxed; enhanced public health because access to low-priced cigarettes is reduced; improved law and order; and reduced the competitive advantage gained through the sale of tax-free cigarettes.

Laws of 2005, ch. 11, § 1.

Matheson has a significant personal interest in a court determination on his objections to the effect of the tribal tax, state laws, and related provisions of the Agreement. Nonetheless, that personal

interest is outweighed by the Tribe's sovereign immunity, along with its interests in raising revenue for essential government services, resolving conflict with the State, improving law and order, and improving public health. The trial court considered all relevant circumstances and correctly dismissed Matheson's claims against the State Defendants under CR 19(b). See Lomayaktewa, 520 F.2d at 1327 (applying the fourth factor and concluding that the adverse effects of cancellation of the lease on the Hopi Tribe "far outweigh the adverse effects visited upon dissident traditional Hopis by reason of the failure to provide another forum for them").<sup>8</sup>

**3. Dismissal of the State Defendants is consistent with Washington cases.**

Matheson faults the trial court for not reaching the same holdings as several state cases and, apparently, finding Wilbur and similar federal cases more persuasive. Brief of Appellant at 12-16. He would like this Court to believe that the state cases hold that "an Indian tribe is never a necessary party and certainly not an indispensable party." Brief of Appellant at 14. The cases say no such thing, and none of them is as

---

<sup>8</sup> Matheson is not wholly without a remedy. As a citizen of the State of Washington and a member of the Puyallup Tribe, he can seek legislative remedies through both governments.

closely analogous to the circumstances in this case as Wilbur and the other federal cases discussed above.<sup>9</sup>

One commentator has accurately noted regarding CR 19, “[t]he reported cases tend to be fact-specific and thus have only limited precedential value.” K. Tegland, 3A *Washington Practice, Rules Practice* at 421 (2006). Here, the most analogous case is Wilbur, which is the reason it is the most persuasive.<sup>10</sup> The trial court appropriately relied on it in applying CR 19 to the claims in this case. But even if the trial court should have relied solely on state cases, which is a somewhat strange notion where the rights of Indians are at issue, the cases on which Matheson primarily relies are completely consistent with the trial court’s order in this case.

The Washington Supreme Court considered claims affecting an Indian tribe in Aungst v. Roberts Constr. Co., 95 Wn.2d 439, 625 P.2d 167 (1981). In Aungst, the claims concerned contracts for camping club memberships sold by a non-Indian agent of the Tulalip Tribe and a tribal corporation. The Court held that because the Tulalip Tribe and a tribal

---

<sup>9</sup> The notion that the trial court erred in considering federal cases to determine the CR 19 issues is meritless. Not only are CR 19 and Fed. R. Civ. P. 19 identical in all material respects, but the Washington Supreme Court has itself relied on federal cases to decide CR 19 cases. See Aungst, 95 Wn.2d at 443-44 (citing six federal cases and two state cases in determining how CR 19 should apply in that case).

<sup>10</sup> The similarities between this case and Wilbur are not a coincidence. Counsel for Matheson was also counsel for Marvin Wilbur, at least until Mr. Wilbur filed his appeal from the district court’s dismissal of his action. CP 645-46.

corporation were nonjoinable parties, the plaintiffs could not pursue an action against the agent for rescission of the membership contracts between plaintiffs and the tribal corporation. 95 Wn.2d at 444. The Court did allow claims under the Consumer Protection Act and the Securities Act of Washington to go forward against the agent because it deemed a judgment against the agent to be adequate, even if limited to the statutory remedies available. Id.

Aungst is consistent with the trial court's ruling in this case because it found the tribe indispensable to a contract rescission claim, and all of Matheson's claims and requested relief require a finding that the Agreement is invalid or illegal. Matheson expressly mentions damages in one paragraph of twelve of his requests for relief, CP 41, but he has never offered an explanation of how he would be entitled to such damages under RICO or any other law without a court determination declaring invalid the Agreement or its authorizing legislation.

A second case on which Matheson relies is Cordova v. Holwegner, 93 Wn. App. 955, 971 P.2d 531 (1999). Brief of Appellant at 12-13. This case is distinguishable. In Cordova, the plaintiff filed an action seeking damages for injuries caused by Mr. Holwegner while working on the Yakama Indian reservation for a tribal corporation. Id. at 958. In his action, he named Mr. Holwegner and the tribal corporation, YA-KI-MA



Logging. Id. at 690. Holwegner and the tribal corporation moved to dismiss based on lack of jurisdiction. Id. Cordova voluntarily dismissed the tribal corporation and Holwegner moved to dismiss the complaint for failing to name a necessary and indispensable party, YA-KI-MA Logging. Id.

The trial court denied the motion and the appellate court affirmed. The appellate court determined the tribal corporation was not a necessary party, because in a tort action the employer and employee are jointly and severally liable for the negligent acts of the employee. Id. at 962. Because it found the tribal corporation was not a necessary party, the court did not reach the question of indispensability. In contrast to the tort claims in Cordova, this case concerns the validity of a contract between the Puyallup Tribe and the State and the legislation authorizing the contract. Matheson cannot obtain any relief in this case without impairing the rights of the parties to the Agreement.

A third case on which Matheson relies is Trans-Canada Enterprises, Ltd. v. King County, 29 Wn. App. 267, 628 P.2d 493, review denied, 96 Wn.2d 1002 (1981). Brief of Appellant at 13. In that case, an owner of property adjacent to a broken dike sought to compel two counties forming a river improvement district to repair the dike. The Muckleshoot Indian Tribe, which claimed ownership of the riverbed and opposed repair

of the dike, was not named as a defendant. The trial court entered a judgment on a writ of mandamus directing the intercounty agency “to proceed promptly to complete the repairs” to the dike without reference to the Tribe’s claim to the riverbed. 29 Wn. App. at 273.

The Court of Appeals in Trans-Canada learned that the federal court had confirmed the Tribe’s claim to the riverbed. Id. at 272 n.2, 273-74. The Court held that although the tribe was a necessary party, the case did not need to be dismissed in the tribe’s absence because the relief granted by the lower court could be modified to avoid any impact on the tribe. 29 Wn. App. at 274. The Court allowed the case to go forward in the trial court, but only if the trial court added language to its order directing the intercounty agency to take action “to the extent not rendered impossible by the legal rights of the Muckleshoot Indian Tribe to the riverbed . . . as adjudicated in the United States District Court . . . .” Id.

The holding in Trans-Canada is interesting because it does not preclude the possibility that the rights of the Muckleshoot Tribe might, in fact, preclude altogether the relief sought. The Court was deferring to the federal court on what those rights might be. Here, as discussed earlier, it is impossible to qualify or limit the relief requested in a manner that would protect the Tribe from harm, given the nature of Matheson’s claims. The relief Matheson seeks precludes the kind of limitation the Court used in

Trans-Canada, assuming that limitation even left the plaintiff property owner with any real relief.

In addition to the foregoing, Matheson may seek to rely in his reply brief on two cases from other states he relied upon in the trial court. See CP 614, 617-18. Both cases are distinguishable, and neither requires maintaining this case in the Puyallup Tribe's absence.

The first case is Saratoga County Chamber of Commerce Inc. v. Pataki, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y.), cert. denied, 540 U.S. 1017 (2003). Legislators, organizations and individuals opposed to casino gambling brought this action challenging the Governor's authority to enter into gaming contracts under the Federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701-21. The Governor had negotiated a contract without legislative approval, so the case presented a significant separation of powers issue under the state's constitution. 798 N.E.2d at 1053-54. This was the primary challenge to the compact.

The court affirmed the trial court's determination that the Governor violated the separation of powers doctrine by signing the compact. Id. at 1059-61. It also affirmed the trial court's determination that St. Regis Mohawk Tribe was not an indispensable party, primarily because the alleged constitutional violation would be without remedy if

the action was dismissed. Id. at 1059. The court also noted the Tribe was voluntarily absent from the case. Id. at 1057-59.

A Wisconsin case is similar. In Panzer v. Doyle, 271 Wis.2d 295, 680 N.W.2d 666 (Wis. 2004), the State Senate Majority Leader, the State Assembly Speaker, and a Joint Committee on Legislative Organization filed an original action in the Wisconsin Supreme Court against the Governor and Secretary of Administration. The claim alleged the Governor had exceeded his authority by agreeing to certain amendments to a gaming contract with the Forest County Potawatami Tribe. 680 N.W.2d at 670. In a lengthy opinion, the court concluded that the Governor had violated the principles of separation of powers. Id. at 701. Before reaching the issue, however, the court addressed and rejected the Governor's assertion that the action should be dismissed for lack of an indispensable party, the tribe. The court stated: "The Tribe's decision not to participate as a party cannot deprive this court of its own core power to interpret the Wisconsin Constitution and resolve disputes between coequal branches of state government." Id. at 683.

Unlike Saratoga and Panzer, this case does not involve a dispute between coequal branches of government requiring a court to determine whether the executive branch has violated separation of powers principles. Here, the Governor's authority under state law to enter into the Agreement

with the Puyallup Tribe is indisputable. RCW 43.06.465. The circumstances of a dispute between coequal branches of the government in Saratoga and Panzer may have justified reaching the merits of those cases without the interested Tribes as parties. Here, however, the Puyallup Tribe's interests are more compelling than Matheson's.

**4. The trial court committed no error in relation to Matheson's proposed Second Supplemental Complaint because it has not yet ruled on the motion.**

At several places in his opening brief, Matheson states or implies that the State Defendants should not have been dismissed because Matheson proposed a "Second Supplemental Complaint for Refund of Cigarette Taxes and Master Settlement Act Assessments." Brief of Appellant at 1 (assignment of error no. 3), 5 (assignment of error no. 8), 11, 14 (heading C), 47-48 (part M of Argument). Matheson asserts the proposed Second Supplemental Complaint "reshapes" the case to avoid CR 19 problems and that the trial court erred in refusing to allow it. Brief of Appellant at 5, 11.

The trial court committed no error in relation to Matheson's proposed Second Supplemental Complaint because it never made a ruling on it. As previously indicated in the Statement of the Case, Matheson noted the motion for permission to file the new complaint for July 7, 2006, but precluded the trial court from ruling on it by filing a Notice of Appeal

from the dismissal orders on July 6, 2006. The parties and the trial court agreed the issue would not be decided until after this Court issues a decision on the issues presented in this appeal. CP 216; 693-94.

Matheson's argument that the trial court refused to consider the proposed new complaint, Brief of Appellant at 11, is a gross mischaracterization of the record.<sup>11</sup>

**C. This Court Has No Need To Consider Whether The Trial Court Acted Within Its Discretion In Denying Matheson's Motion for Reconsideration Of The Dismissal Orders, Though It Certainly Did.**

Matheson's Notice of Appeal seeks review of the Order Denying Plaintiff's LCR 59 Motion for Reconsideration of Motions to Dismiss. CP 211-15. Surprisingly, however, Matheson has not assigned error to that order in his assignments of error nor has he included any argument in his opening brief on the topic of his motion for reconsideration of the dismissal orders. Nor did he designate in the Clerk's Papers his motion for reconsideration of the dismissal orders. Because he has not properly presented the issue for review by this Court, it should not be considered.

---

<sup>11</sup> Had the trial court actually reached the issue and denied Matheson's motion to file the Second Supplemental Complaint, it would have committed no error. The State Defendants noted in their opposition to the motion that the new complaint would have the same CR 19 problems as the original Complaint has, with the exception of the new claim related to the State's Master Settlement Agreement with tobacco manufacturers. CP 653-54 & 663-74 (Attachment A).

Bercier v. Kiga, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), review denied, 155 Wn.2d 1015 (2005).

## V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's dismissal of claims against the Tribal Defendants and the claims against Governor Christine Gregoire, Cindi Yates, Gary O'Neil, M. Carter Mitchell, the Washington State Department of Revenue, the Washington State Liquor Control Board, and the State of Washington.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of October, 2006.

ROB MCKENNA  
Attorney General



Heidi A. Irvin, WSBA #17500  
David M. Hankins, WSBA #19194  
Assistant Attorneys General  
Attorneys for State Respondents

**CIGARETTE TAX AGREEMENT**

**Between**

**THE PUYALLUP TRIBE OF INDIANS**

**And**

**THE DEPARTMENT OF REVENUE**



## Table of Contents

<b>PREAMBLE</b>	.....	<b>1</b>
<b>PART I</b>	<b>Recitals.....</b>	<b>2</b>
<b>PART II</b>	<b>Definitions.....</b>	<b>2</b>
<b>PART III</b>	<b>Applicability of the Agreement.....</b>	<b>4</b>
<b>PART IV</b>	<b>Imposition of Tribal Cigarette Taxes.....</b>	<b>5</b>
<b>PART V</b>	<b>Purchase of Cigarettes by Tribally-Licensed Retailers.....</b>	<b>5</b>
<b>PART VI</b>	<b>Tax Stamps.....</b>	<b>6</b>
<b>PART VII</b>	<b>Wholesalers.....</b>	<b>7</b>
<b>PART VIII</b>	<b>Enforcement Authority Program.....</b>	<b>8</b>
<b>PART IX</b>	<b>Compliance and Enforcement.....</b>	<b>9</b>
<b>PART X</b>	<b>Dispute Resolution.....</b>	<b>10</b>
<b>PART XI</b>	<b>Responsibilities of the Tribe, the Department of Revenue, and the Liquor Control Board.....</b>	<b>13</b>
<b>PART XII</b>	<b>Term of this Agreement – Amendment.....</b>	<b>13</b>
<b>PART XIII</b>	<b>Confidentiality.....</b>	<b>14</b>
<b>PART XIV</b>	<b>Miscellaneous Provisions.....</b>	<b>14</b>

## **PREAMBLE**

**WHEREAS, the Puyallup Tribe of Indians ("Tribe") is a federally-recognized Indian tribe and sovereign Tribal government, pursuant to the Treaty of Medicine Creek with the United States of America (10 Stat. 1132), and the Tribe's Constitution and Bylaws; and**

**WHEREAS, the state of Washington ("State") is a state within the United States of America, possessed of full powers of state government; and**

**WHEREAS, the body of federal law and policy recognizes the right and the importance of self-determination for tribes, the authority of a tribe to tax certain activities, and the need for tribal economic development; and**

**WHEREAS, the State has committed to the political integrity of the federally-recognized tribes within the state of Washington and has formally recognized that the sovereignty of each tribe provides paramount authority for the tribe to exist and to govern; and**

**WHEREAS, a long-standing disagreement exists between the Tribe and the State over questions regarding jurisdiction over and the taxation of the sale and distribution of cigarettes; and**

**WHEREAS, the State and the Tribe will benefit from resolution of that disagreement by the change in focus from enforcement and litigation to a focus on the administration of and compliance with this Cigarette Tax Agreement; and**

**WHEREAS, the Tribe and State will benefit from resolution of that disagreement by the tax base this Agreement will enable, taxation being an essential attribute of tribal sovereignty and a tool of self-sufficiency; and**

**WHEREAS, the State and the Tribe will also benefit by the exercise of the attributes of sovereignty and from the improved well-being of enrolled members that will result from economic development by the Tribe and its members; and**

**WHEREAS, both the Tribe and State desire a positive working relationship in matters of mutual interest and seek to resolve disputes and disagreements by conducting discussions on a government-to-government basis; and**

**WHEREAS, the mutual interests of the State and the Tribe brought these two governments together to pursue their common interest in resolving this tax disagreement; and**

**WHEREAS, nothing herein shall waive the sovereign immunity from suit of the Tribe or the State, nor shall anything herein waive, alter, or diminish any rights, privileges, or immunities guaranteed by the Treaty of Medicine Creek; and**

**NOW THEREFORE, the Puyallup Tribe by and through its Chairman, and the state of Washington by and through its Governor, do hereby enter into this Agreement for their mutual benefit.**

## **PART I**

### **Recitals**

#### **1. Sovereign Immunity**

Nothing in this Agreement shall be construed as a waiver, in whole or in part, of either party's sovereign immunity.

#### **2. Tribe Does Not Submit to State Jurisdiction**

By entering into this Agreement, the Tribe does not concede that the laws of the State, including its tax and tax collection provisions, apply to the Tribe, its members, or agents regarding activities and conduct within or outside of Indian country.

#### **3. State Does Not Concede Tribal Immunity**

By entering into this Agreement, the State does not concede that the Tribe has any immunity from its tax and tax collection provisions.

#### **4. Agreement Does Not Create any Third Party Beneficiaries**

No third party shall have any rights or obligations under this Agreement.

#### **5. Tobacco Master Settlement Agreement**

This Agreement is not intended to impact the State's share of proceeds under the Master Settlement Agreement entered into by the State on November 23, 1998. The Tribe recognizes the State has an interest regarding nonparticipating manufacturers. The State recognizes the Tribe has an interest in the Master Settlement Agreement. The Tribe agrees that it will not impede the State's efforts to secure compliance of the nonparticipating manufacturers, and the Tribe reserves its rights regarding these matters. Nothing in this Agreement supercedes or replaces chapters 70.157 or 70.158 RCW.

#### **6. Jurisdiction**

This Agreement does not expand or limit the jurisdiction of either the Tribe or the State.

## **PART II**

### **Definitions**

1. "Agreement" means this Agreement entered into by the State and the Puyallup Tribe.
2. "Carton" or "carton of cigarettes" means, unless otherwise indicated, a carton of two hundred (200) cigarettes.
3. "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

4. "Department" means the Washington State Department of Revenue.
5. "Essential government services" means services provided by the Tribe, including, but not limited to, administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development.
6. "Indian country," consistent with the meaning given in 18 U.S.C. 1151, means:
  - a. All land within the limits of the Puyallup Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the Reservation; and
  - b. All Indian allotments or other lands held in trust for an enrolled Tribal member or the Tribe, the Tribal titles to which have not been extinguished, including rights of way running through the same.
7. "Liquor Control Board" or "Board" is an agency of the State with a mission to prevent the misuse of alcohol and tobacco through education, enforcement, and controlled distribution.
8. "Non-Indian" means an individual who is neither a Tribal member nor a nonmember Indian.
9. "Nonmember Indian" means an enrolled member of a federally recognized Indian Tribe other than the Puyallup Tribe.
10. "Parties to the Agreement" or "parties" means the Puyallup Tribe and the State.
11. "Puyallup Indian Reservation" or "Reservation" means the area recognized as the Puyallup Indian Reservation by the United States Department of the Interior.
12. "Retail selling price" means the ordinary, customary, or usual price paid by the consumer for each package or carton of cigarettes, which price includes the Tribal cigarette tax.
13. "State" means the state of Washington.
14. "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking. "Tobacco products" do not fall within the definition of "cigarettes."
15. "Tribal member" means an enrolled member of the Puyallup Tribe. For purposes of this Agreement, a member of another federally recognized Tribe who is the spouse of an enrolled Puyallup Tribal member shall be treated the same as an enrolled member of the Puyallup Tribe.

16. "Tribally-licensed retailer" means a tribal member who has a business license from the Puyallup Tribe to sell cigarettes at retail from a business located in Indian country.
17. "Tribal cigarette tax" means the tax enacted as a provision of Tribal ordinance on cigarettes sold at retail, expressed as a flat amount in cents per cigarette and units of packs and cartons, as more fully set forth in Part IV of this Agreement.
18. "Tribe," or "Tribal," means or refers to the Puyallup Tribe.
19. "Wholesaler" means a person who purchases, sells, or distributes cigarettes for the purpose of resale.

### **PART III**

#### **Applicability of the Agreement**

##### **1. Execution of Agreement**

This Agreement shall become effective upon completion of three steps: (a) authorization for the Governor's signature by enactment of the Washington Legislature; (b) approval by the Tribal Council as indicated by the signature of the Tribal Chairman, and (c) approval by the State as indicated by the signature of the Governor. This Agreement shall be executed in duplicate originals, with each party retaining one fully-executed duplicate original of the Agreement.

##### **2. Application**

From its execution, and contingent on the imposition of the Tribal cigarette tax pursuant to a Tribal resolution meeting the terms of Part IV of this Agreement, this Agreement shall apply to the retail sale of cigarettes by the Tribe as a retailer and by Tribally-licensed retailers. Sales subject to the Tribal cigarette tax imposed pursuant to this Agreement are those in which delivery and physical transfer of possession of the cigarettes from the retail seller to the buyer occurs within Indian country. If the Tribe desires to pursue mail order and/or internet sales of cigarettes, the Tribe and State agree to negotiate in good faith mutually acceptable terms and conditions of a memorandum of understanding concerning the taxation of such sales.

##### **3. Scope Limited**

This Agreement is limited in scope to the selling of cigarettes by the Tribe and its members. This Agreement does not affect the tax obligations or tax treatment of:

- a. Cigarettes sold at retail by non-Indians or nonmember Indians;
- b. Tobacco Products as defined in Part II of this Agreement; and
- c. Cigarettes manufactured by the Tribe or its enterprises within Indian country.

**PART IV**  
**Imposition of Tribal Cigarette Taxes**

**1. Tribally-Licensed retailers**

- a. The Tribe shall require, by enactment of Tribal law, that each Tribally-licensed retailer comply with the terms of this Agreement. The Tribe agrees that it will maintain and enforce a requirement that any Tribal member selling cigarettes at retail on the Puyallup Indian Reservation must first obtain a business license from the Tribe. The Tribe agrees to provide to the Department and the Board upon execution of this Agreement a list of Tribally-licensed retailers, and to provide the Department and Board with an up to date version of the list. The Tribe agrees that any cigarette retailer wholly owned by Tribe is subject to this Compact. The Tribe and the State agree that compliance efforts in regard to such retailers shall be in accordance with Part IX of this Agreement.
- b. The Tribe shall enact policies regarding Tribal access to records of Tribally-licensed retailers. Such policies shall be in accord with and in furtherance of Part IX of the Agreement.

**2. Tax Imposed on Retail Sales by Tribally-Licensed Retailers and the Tribe**

- a. Subject to Part VI, Section 1, concerning retail sales to Tribal members, the Tribe, by ordinance and in accord with the requirements of this Part, shall impose Tribal cigarette taxes on all sales by the Tribe as retailer and by Tribally-licensed retailers of cigarettes to retail purchasers within Indian country.
- b. Beginning no sooner than the date this Agreement is signed by both parties, and subject to enactment of a Tribal ordinance authorizing the imposition of a Tribal cigarette tax, the Tribe shall impose and maintain in effect a tax on the retail sale of cigarettes equaling no less than 5.875 cents per cigarette (eleven dollars and seventy-five cents per standard carton).
- c. During the term of this Agreement, upon any future increase in the State cigarette tax, the Tribal cigarette tax shall increase by no less than the dollar amount of the increase in the State tax. Upon any future decrease in the State cigarette tax, the Tribe may decrease its cigarette tax in a similar manner.
- d. During the term of this Agreement the State agrees that State taxes are not applicable to transactions that comply with the requirements of this Agreement. The State waives its right to collect the State cigarette, sales, and use taxes as to those transactions from the Tribe, Tribally-licensed retailers, state licensed wholesalers from which they purchase, or retail buyers. In addition, the State agrees that enforcement of this Agreement shall be done in accordance with the conditions set forth in this Agreement.

**3. Revenue-Sharing**

The Tribe shall provide to the State, on a quarterly basis, thirty percent (30%) of the revenue that the Tribe receives from the collection of the Tribal cigarette tax imposed under this part.

**PART V**  
**Purchase and Sale of Cigarettes by Tribal Retailers**

**1. Wholesale Purchases – Requirements**

By Tribal ordinance, the Tribe shall maintain and enforce a requirement that the Tribe as a retailer and Tribally-licensed retailers acquire cigarettes only from wholesalers or manufacturers licensed by the State to sell cigarettes at wholesale in the State; or the Tribe, subject to the requirements of Part VII, section 2 of this Agreement.

**2. Delivery of Cigarettes to Tribal Retailers Outside of Indian Country**

Cigarettes bearing the tax stamp required by this Agreement may be delivered or transferred within or outside of Indian country by a wholesaler to the Tribe or a Tribally-licensed retailer. Deliveries may be made by commercial carriers. Invoices identifying the cigarettes as Puyallup Tribe cigarettes must accompany such cigarettes.

**3. Retail Sale – Pricing Requirements**

The retail selling price of any cigarette must not be less than the price paid by the retailer for the cigarette, and such price must include the full amount of cigarette tax imposed on the cigarettes.

**PART VI**  
**Tax Stamps**

**1. Tax Stamp Required**

- a. Tribal retailers may not possess unstamped cigarettes. All cigarettes sold by Tribally-licensed retailers and the Tribe shall bear a Tribal tax stamp meeting the requirements of part VI.
- b. The Tribe agrees to require Tribally-licensed retailers to post a notice advising that cigarettes may not be purchased for resale.
- c. The Tribe agrees it will impose a tax on sales to members.

**2. Creation and Supply of Tribal Tax Stamp**

- a. The Tribe shall arrange for the creation and supply of a Tribal tax stamp by an appropriate manufacturer. Tribal tax stamps will have a serial number or some other discrete identification so that stamps may be traced to the wholesaler.
- b. The Tribe shall purchase stamps from a nationally recognized stamp manufacturer.

**3. Stamp Vendor Contract**

- a. The Tribe shall contract with a bank or other appropriate vendor to distribute tax stamps. The stamp vendor shall distribute stamps to wholesalers, upon payment by the wholesaler to the vendor of the Tribal cigarette tax and remit the collected taxes to the Tribe. The contract shall provide that the Tribe shall purchase a supply of Tribal tax stamps from the manufacturer and make them available for purchase by wholesalers through the stamp vendor. The Tribe may, at its option, select as the stamp vendor the bank with which the Department contracts for that service, or some other third party stamp vendor satisfactory

to both the Tribe and the Department. The Tribe agrees to provide the Department of Revenue with a copy of its stamp vendor contract.

- b. The Tribe shall require the stamp vendor to:
  - i) Remit to the Tribe all revenue collected from the Tribal cigarette tax (such amount being less a reasonable administrative fee for stamping wholesalers);
  - ii) Provide to the Tribe and to the Department timely reports detailing the number of Tribal tax stamps sold, and make its records available for auditing by the Tribe and the Department;
- c. This agreement contemplates that the Tribe may at some point in the future act as its own stamp vendor. In the event that the Tribe decides to act as its own stamp vendor, it agrees to first enter into a memorandum of agreement with the Department regarding this activity.

#### **4. Requirements for Affixation of Stamps by Wholesalers**

- a. Wholesalers shall affix the tax stamps to the smallest container of cigarettes that will be sold or distributed by the Tribally-licensed retailer. Stamps shall be affixed so that the stamps may not be removed from the package without destroying the stamp.
- b. Wholesalers may only possess unstamped cigarettes for as long as is reasonably necessary to affix tax stamps to the packages for sale. It is presumed that any such possession in excess of seventy-two (72) hours (excluding Saturdays, Sundays, and Holidays) is in contravention of this Agreement. The term "holiday" is limited to the following holidays: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas.
- c. For the purposes of this Section 4 of Part VI, any business outlet selling cigarettes at retail, including an outlet wholly owned and operated by the Tribe, is not a wholesaler. The Tribe agrees to purchase for and sell from any retail outlet that it owns and operates only stamped cigarettes acquired from the sources listed in Part V of this Agreement.

#### **5. Wholesaler Obligation Under State Law**

Affixing of the tax stamps, retention and production of records required by state law (in the case of state licensed wholesalers) and by this Agreement (in the case of Tribe acting as a wholesaler and subject to Part VII (2) of this Agreement), and compliance with other requirements in this Agreement, shall be deemed to satisfy the State cigarette excise tax obligation of a wholesaler.

#### **6. State Agreement Regarding Compliance with State and Federal Law**

The State agrees that all transactions that conform with the requirements of this Agreement do not violate state law and that it will not assert that any such transaction violates state law for the purpose of 18 U.S.C. § 2342 or other federal law specifically based on violation of state cigarette laws or other tax laws.



## **PART VII Wholesalers**

### **1. Wholesalers Licensed by the State**

Wholesalers licensed by the State are subject to the requirements as set forth in Title 82 RCW and any rules adopted thereunder, and therefore must maintain adequate records detailing which cigarettes are subject to State tax and which cigarettes are subject to the Tribal cigarette tax.

### **2. Tribe as Own Wholesaler**

The Tribe may sell stamped cigarettes to Tribally-licensed retailers for sale at retail under the terms of this Agreement. If the Tribe, by itself or through a wholly-owned and operated Tribal enterprise, sells cigarettes at wholesale to Tribally-licensed retailers, that wholesale activity does not require a memorandum of agreement under this Section. However, the Tribe agrees that it will be subject to the same buying restrictions as wholesalers licensed with the state of Washington, including the provisions of chapters 70.157 and 70.158 RCW, and RCW 19.91. 300. In addition, the Tribe agrees that it will notify the State in advance of initiating business as a wholesaler and will work in conjunction with the Department of Revenue and the Liquor Control Board to assure that all necessary steps and controls are in place to assure security of the stamping process, handling of tax receipts, and integrity of the overall function.

## **PART VIII Enforcement Authority Program**

### **1. Intent**

It is the intent of the parties that responsibility for enforcement of the terms of this Agreement shall be shared by the State and the Tribe. The State shall have primary responsibility, exercised by its Liquor Control Board, for enforcement against non-Tribal and non-Tribal member wholesalers, to the extent allowed under law. The Tribe shall have primary responsibility for enforcement against Tribal member retailers. The parties shall work cooperatively by providing each other with relevant information and in other necessary ways to facilitate their respective enforcement responsibilities.

### **2. Commercial Carriers**

The State recognizes that wholesalers who meet the requirements of this Agreement may make shipments of cigarettes by commercial carrier. Such shipments must be accompanied by documents required under this Agreement and are subject to advance notice requirements.

### **3. Notification**

If the Tribe has elected to act as a wholesaler, the Tribe or its designee shall notify the Department seventy-two (72) hours in advance of any shipments of unstamped cigarettes to the Tribe. Such notice shall include who is making the shipment (meaning who is the wholesaler), detail regarding both quantity and brand, and the invoice order number. Transportation of the cigarettes without the notice required by this section subjects the

cigarettes to seizure. The State and the Tribe may enter into a memorandum of agreement addressing the Tribe's activity as a wholesaler, in which case, this advance notice provision is not applicable and is supplanted by the terms of the memorandum of agreement.

## **PART IX**

### **Compliance and Enforcement Program**

#### **1. General**

The parties wish to provide assurance and ongoing confirmation that they are in compliance with the terms of this Agreement. This Part will provide a process for regular verification of that compliance. The verification process is intended to reconcile data from all sources that make up the cigarette stamping, selling, and taxing activities under this Agreement. Both parties acknowledge that the requirement to purchase cigarettes from wholesalers licensed with the State provides the State access to wholesaler records and provides both parties certainty in regards to stamping of cigarettes and collection of taxes.

#### **2. Compliance Program**

- a. The Tribe agrees to establish, in consultation with the Liquor Control Board and the Department of Revenue, a retailer compliance program. The purpose of the program is to monitor compliance with this Agreement and the ordinances enacted to implement this Agreement. The program shall include measures to monitor and investigate retailers in regard to:
  - i) Sales to minors;
  - ii) Sales of unstamped cigarettes;
  - iii) Sales of cigarettes obtained from unauthorized sources;
  - iv) Pricing compliance; and
  - v) Other factors agreed to by the parties.
- b. The Tribe agrees it will provide monitoring, sampling, investigation, reporting, and related activities necessary to carry out the retailer compliance program, either by contract with an independent third party or by the Tribe's Cigarette Tax Enforcement Department ("CTED.") These functions will be conducted either by CTED or by a third party under contract with the Tribe. The choice between those two options and the identify of the third party, if any, is subject to the approval of the State.
- c. The Tribes agrees that it will require in its contract with the third party that all reports be shared simultaneously with the Tribe, the Department of Revenue, and the Board. The Tribe, Board, and Department of Revenue working together shall establish the frequency for reports and criteria for timeliness of reporting and sharing information regarding violations. Except in cases of suspected and/or documented violations of the Agreement or Tribal law, the reports will not reveal the identities of retailers who are the subjects of the reports, other than to verify that all Tribally-licensed retailers have been monitored within the period of time specified by the parties as appropriate.

#### **3. Tribal Auditor to Review Government Records**

- a. For the purposes of any audit involving its government accounts and enterprise activities, the Tribe may use the same independent auditor that it uses to perform its routine

government audits. The Tribe agrees that the auditor will be a certified public accountant in good standing. The Auditor will review records on an annual basis, consistent with the Tribe's fiscal year, to verify the requirements of this Part unless otherwise specified. The Tribe will retain the Auditor and bear the costs of the auditing services. The Tribe shall be entitled to communicate freely with the Auditor.

- b. The Auditor shall review records for all years during the current appropriate audit cycle, and may review records for earlier years after the date of the signing of the Agreement only as necessary for an internal reconciliation of the Tribe's books. The purpose of the audit is to reconcile tax collections and to provide the State timely and accurate information regarding compliance with this Agreement.
- c. The Auditor will compile and provide to the Department of Revenue, the Liquor Control Board, and the Tribe, a separate report containing timely and accurate information on the following topics:
  - i. Overall tax collection;
  - ii. Revenue sharing;
  - iii. Stamp inventory and stamp purchases (in order to reconcile tax collections);
  - iv. A determination of whether the Tribe has expended revenue from the cigarette tax on essential government services.
- d. The Auditor shall provide a report on these topics to the Tribe, the Department, and the Liquor Control Board, once a year, covering the just-concluded fiscal year, and shall be delivered no later than 90 days after the end of the Tribe's fiscal year. The first required review shall cover the period from the effective date of the tax through the end of the Tribe's fiscal year. The Department and the Board shall be entitled, by operation of this Agreement, to the Auditor's report as outlined in this subsection, but not to a copy of the Auditor's complete audit of the Tribe's books and records.

## **PART X**

### **Dispute Resolution**

#### **1. General**

- a. The Tribe and the State wish to prevent disagreements and violations whenever possible, and to quickly and effectively resolve disagreements and violations when they arise. It is the parties' expectation that most disagreements and violations should and will be resolved most effectively through informal discussion. The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this Part.
- b. As used in this Part "days" means business days, unless otherwise specified.

#### **2. Summary**

The parties intend, as spelled out in greater detail below, that the dispute resolution process will include the following elements:

- a. Notification of Violation;
- b. Meeting(s) and informal discussion seek resolution of dispute;
- c. Mediation: opinion and recommendation of mediator;
- d. Correction of violation;

- e. Termination of Agreement under defined circumstances.

### **3. Notification of Violation**

- a. If a party believes that there has occurred or is occurring a violation covered by this Part X, it shall notify the other party in writing, stating the nature of the alleged violation and any proposed corrective action or remedy ("Notice of Violation"). Violations that are subject to this Part include violations of (a) this Agreement or (b) applicable law that either party has undertaken in this Agreement to enforce, committed by (x) either party, (y) a Tribally-licensed retailer, or (z) a state-licensed wholesaler. An error made by the Auditor in any of its reports is also an appropriate subject for the dispute resolution procedure in this Part X.
- b. The parties shall meet within 14 days after receipt of a Notice of Violation, unless the parties agree on a different date, and on such further occasions as they shall agree to meet. They shall attempt to resolve the issue(s) raised by the Notice of Violation and to provide an opportunity to implement any agreed corrective action.

### **4. Mediation**

- a. If the parties are unable to resolve the disputed issues through joint discussions under Section 3 of this Part, either party may request mediation by giving the other party a written mediation demand ("Mediation Demand"). The parties shall attempt to agree on a mediator. If they cannot agree on a mediator within 30 days of the Mediation Demand, each party shall select a mediator and the two mediators selected by the parties shall jointly select a third mediator. Mediation shall occur within a reasonable time of selection of the mediator(s). The parties shall bear their own attorneys fees but shall share equally the other costs of conducting the mediation, including the fees of the mediator.
- b. The parties recognize that disagreements and violations of the terms of this Agreement caused by actions of any retailer or wholesaler may take longer to resolve. With respect to that part of a disagreement or dispute involving a member retailer, the parties must wait at least 45 days after the sending of the Notice of Violation before delivering a Mediation Demand. The parties recognize that in cases where the appropriate remedy for a violation is enforcement action against the retailer or wholesaler, that action, even though initiated within 45 days, may take longer than that period of time to complete. It is the expectation of the parties that the parties will work together diligently during this period to arrive at a solution.

### **5. Opinion, Recommendation, Remedies**

Within a reasonable time after completion of the mediation session(s), the mediator(s) shall render an opinion as to whether a violation has occurred, including any recommended corrective action to remedy the violation. The mediator(s) shall not render an opinion or make a recommendation as to any issue on which the parties have reached agreement. Recommended remedies may include audit of relevant Tribal, a retailer's, or a wholesaler's records, interpretation of Agreement terms, changes in reporting, recordkeeping, enforcement practices, business practices, action by one or both parties to enforce the requirements of this Agreement or of applicable law, or similar actions. Recommended remedies shall not

include an award of monetary damages or costs of any kind, or the disclosure of any records not specifically subject to disclosure under this Agreement.

#### **6. Termination of Agreement**

a. It is the parties' intent that in cases where, in the mediator(s) opinion, there has been a substantial violation of this Agreement, the offending party be given a reasonable time to initiate and complete corrective action. A "reasonable time" will vary with the circumstances, but shall in general be the time that would ordinarily be required for a government, taking immediate action pursued with due diligence, to correct the violation or obtain compliance. A "substantial violation" is any violation that deprives either party of an important element of what it bargained for in this Agreement and includes, but is not necessarily limited to, the following violations:

- i) Ongoing, significant retail sales of unstamped cigarettes during the term of this Agreement;
- ii) Failure to submit to mediation as required by this Part;
- iii) Failure of the Tribe to establish a compliance program;
- iv) A breach of the confidentiality provisions of Part XIII of this Agreement;
- v) Failure of the Tribe to meet the revenue sharing obligations under this Agreement
- vi) The State's violation of Part IV, Section 2(d) or Part VI, Section 6 of this Agreement;
- vii) The Tribe's refusal to allow or require the Auditor access to records it needs to conduct its audit; and
- viii) Failure of the Tribe to enforce the terms of this Compact in regards to member retailers.

b. If the party in violation has not corrected the problem or obtained or sought compliance within a reasonable time, after receipt of the mediator(s) opinion finding a substantial violation of the Agreement, the aggrieved party may, in its discretion choose to terminate this Agreement. If the aggrieved party chooses not to terminate the Agreement at that time, it does not waive its right to terminate the Agreement subsequently at any time if the violation remains uncorrected.

#### **7. Notification of Sales to Minors Violation**

The Department and/or the Liquor Control Board shall immediately notify the Tribe if an allegation is made that a Tribally-licensed retailer has made sales to minors in violation of Part XIV, Section 2 of this Agreement. Upon such notification, the Tribe shall take enforcement action according to the provisions of Tribal law. Upon the third or subsequent violation within any calendar year, the provisions of Sections 2 through 5 of this Part shall apply.

#### **8. Notice Requirements**

For the purposes of this Agreement, notice shall be by certified mail, return receipt requested, unless both parties agree in writing to accept notice by facsimile. Notice shall be deemed to be given three (3) working days after the date written notice is sent. Notice shall be given as follows:

To the Department:      Director  
Washington State Department of Revenue  
P.O. Box 47454  
Olympia, WA 98504-7454

To the Tribe:              Chairman, Puyallup Tribal Council  
1850 Alexander Avenue  
Tacoma, WA 98421

With a copy to:          Legal Department  
Puyallup Indian Tribe  
1850 Alexander Avenue  
Tacoma, WA 98421

**PART XI**  
**Responsibilities of the Tribe, the Department of Revenue,**  
**and the Liquor Control Board**

The Parties recognize that this Agreement describes a mutual undertaking with shared responsibilities and further recognize the responsibilities of the Tribe, the Department of Revenue, and the Liquor Control Board to be as follows:

**1. Tribe**

The Tribe is responsible for the administration of the Agreement, a compliance program, audit and recordkeeping, and dispute resolution, as well as negotiation of its terms.

**2. Liquor Control Board**

This Agreement does not alter the Liquor Control Board's responsibility under chapter 82.24 RCW. The Board is responsible to provide input and expertise to the Department during negotiations and to work together with the Department of Revenue and the Tribe to ensure compliance with this Agreement.

**3. Department of Revenue**

The Department is responsible for the administration of the Agreement, audit procedures and recordkeeping, and dispute resolution, as well as negotiation of its terms, on behalf of the State.

**PART XII**  
**Term of this Agreement – Amendment**

This Agreement may remain in effect no longer than eight (8) years from its effective date, subject to the termination provisions of Part X of this Agreement. Amendments or extensions to the Agreement shall be considered upon the written request of either party. Disputes regarding

requests for amendment of this Agreement shall be subject to the dispute resolution process in Part X of this Agreement.

### **PART XIII**

#### **Confidentiality**

All information under the terms of this Agreement received by the Department or open to Department review is "return or tax information" and is subject to the provisions of RCW 82.32.330, the tax information "secrecy clause." All other information that is subject to review by the Auditor or review by the mediator or certified public accountant is confidential and shall not be disclosed to anyone, in any forum, for any purpose.

### **PART XIV**

#### **Miscellaneous Provisions**

##### **1. Periodic Review of Agreement Status**

- a. Representatives of the Tribe and the Department shall meet at mutually agreeable times and places upon the reasonable request of either party to review the status of this Agreement and any issues that have arisen under the Agreement.
- b. It is the expectation of the parties that the Tribe, the Department, and the Liquor Control Board will meet freely to discuss jurisdictional issues, expectations, and protocols, and to share enforcement and compliance information.

##### **2. Sales to Minors**

Neither the Tribe nor a Tribally-licensed retailer shall sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen (18) years.

##### **3. Essential Government Services**

Tribal cigarette tax revenue shall be used for essential government services. The Auditor shall certify the use of such revenue under the process set forth in Part IX of this Agreement.

##### **4. Rule 192 – Application**

This Agreement is a "cooperative agreement" as that term is used in WAC 458-20-192 (Rule 192).

##### **5. Other Retail Sales within Indian Country by Tribal Members**

Under Puyallup Tribal law, only licensed Tribal retailers are permitted to make retail cigarette sales within Indian country. The Tribe agrees to provide through tribal ordinance for suspension or revocation of such license in those instances where after notice is given and opportunity to comply is provided, the retailer's sale of cigarettes remains out of compliance with the requirements of this Compact.

**6. Subsequent State Legislative Enactments**

If the State Legislature enacts a law that provides more favorable terms for the Puyallup Tribe, the parties shall amend the Agreement to reflect such terms.

**7. Severability**

If any provision of this Agreement or its application to any person or circumstance is held invalid, the remainder of the Agreement is not affected.

THUS AGREED THIS 20<sup>th</sup> day of April, 2005

**PUYALLUP TRIBE**

**STATE OF WASHINGTON**

By:

Herman Dillon, Sr.  
Herman Dillon, Sr.,  
Chairman  
The Puyallup Tribe

By:

Christine O. Gregoire  
Christine O. Gregoire,  
Governor  
State of Washington



**TITLE 3 BUSINESS, COMMERCE, AND TRADE**  
**CHAPTER 7 CIGARETTE CODE**

Section

**SUBCHAPTER 1. GENERALLY**

- 3.07.010 Definitions
- 3.07.020 Privilege of operating a Cigarette Retail Shop
- 3.07.030 Condition for Continuation
- 3.07.040 Revocation, Modification or Alteration of Privilege

**SUBCHAPTER 2. LICENSING GENERALLY AND FEES**

- 3.07.110 License Required
- 3.07.120 Eligible Persons
- 3.07.130 License Term
- 3.07.140 License Processing Fee
- 3.07.150 Annual Licensing Fee
- 3.07.160 Nonpayment Penalty
- 3.07.170 Duplicate License Fee

**SUBCHAPTER 3. LICENSING PROCEDURES**

- 3.07.210 Application – Required Forms and Documents
- 3.07.220 Application – Information Required
- 3.07.230 Application Denial
- 3.07.240 License Renewal
- 3.07.250 License Transfer
- 3.07.260 License Posting
- 3.07.270 Separate Licenses for Multiple Locations
- 3.07.280 Dual Businesses at the Same Location
- 3.07.290 Compliance With Tribal Zoning Regulations

**SUBCHAPTER 4. CIGARETTE TAXATION**

- 3.07.310 Administration and Collection
- 3.07.320 Applicability
- 3.07.330 Amount of Tax
- 3.07.340 Exemption – Gross Proceeds Tax
- 3.07.350 Record of Revenue Required

- 3.07.360 Proceeds Sharing
- 3.07.370 Essential Government Services

#### SUBCHAPTER 5. COMPLIANCE PROGRAM

- 3.07.410 Purpose
- 3.07.415 Applicability
- 3.07.420 Administration
- 3.07.425 Compliance Checks
- 3.07.430 Sale to Minors Prohibited
- 3.07.431 Sale to Minors Prohibition Sign to be Posted
- 3.07.432 Age Identification Requirement
- 3.07.433 Sale to Minors – Penalty
- 3.07.440 Sale of Unstamped Cigarettes
- 3.07.441 Stamp Compliance
- 3.07.442 Sale of Unstamped or Improperly Stamped Cigarettes – Penalty
- 3.07.450 Sale of Cigarettes to Reseller Prohibited
- 3.07.451 Resale Prohibition Sign to be Posted
- 3.07.452 Sale of Cigarettes to Reseller – Penalty
- 3.07.460 Sale of Cigarettes Obtained from Unauthorized Sources
- 3.07.461 Authorized Sources
- 3.07.462 Sale of Cigarettes Obtained from Unauthorized Sources – Penalty
- 3.07.470 Pricing Compliance
- 3.07.471 Sale of Cigarettes Below Minimum Price Requirement – Penalty
- 3.07.480 Sale of cigarettes by mail order or through the internet
- 3.07.481 Sale of cigarettes by mail order or internet – Penalty
- 3.07.490 Failure or Refusal to Pay Monetary Penalties – Suspension of License
- 3.07.491 Collection of Information
- 3.07.492 Failure or Refusal to Provide Required Information or Access – Penalty

#### SUBCHAPTER 6. ADMINISTRATIVE AND JUCICIAL PROCEDURE

- 3.07.510 Administrative Procedure
- 3.07.520 Post-Deprivation Hearing
- 3.07.530 Civil Enforcement
- 3.07.540 Criminal Enforcement

## SUBCHAPTER 7. MISCELLANEOUS

- 3.07.610 Noncompliance – Report to Department
- 3.07.620 Noncompliance – Waiver of Privilege and Protection
- 3.07.630 Illegal Substances – Zero Tolerance
- 3.07.640 Severability

## SUBCHAPTER 1. GENERALLY

### 3.07.010 Definitions

1. "Cigarette Compact" means the Cigarette Compact and subsequent Agreement entered into between the Puyallup Tribe and the State of Washington.
2. "Cigarette Retail Shop" means a Member-owned business on the Reservation that sells cigarettes at retail.
3. "Council" means the Puyallup Tribal Council.
4. "Department" means the Puyallup Tribe's Cigarette Tax Department.
5. "Essential Government Services" means services provided by the Puyallup Tribe, including, but not limited to, administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development.
6. "Member" means an enrolled member of the Puyallup Tribe.
7. "Reservation" means the area recognized as the Puyallup Indian Reservation by the United States Department of Interior.
8. "Tribal Enterprise" means any business owned by the Tribe.
9. "Tribe" or "Tribal" means or refers to the Puyallup Tribe.
10. "Trust Land" means lands held in trust by the United States for the benefit of an enrolled Tribal member or the Tribe.

3.07.020 Privilege of Operating a Cigarette Retail Shop

In order to promote the further economic development of the Tribe, to clearly establish and exercise the Tribe's authority to regulate the conduct and operation of Cigarette Retail Shops within the Reservation, and in order to maintain compliance with the Cigarette Compact, the Council hereby declares that the Tribe has the authority to grant, deny, or withdraw the privilege of operating a Cigarette Retail Shop within the Reservation, except as limited by applicable law.

3.07.030 Condition for Continuation

The grant of the privilege of operating a Cigarette Retail Shop within the Reservation is conditioned upon the business' compliance with this chapter and other applicable laws of the Tribe.

3.07.040 Revocation, Modification or Alteration of Privilege

The Council hereby reserves the right to revoke this grant of privilege of operating a Cigarette Retail Shop within the Reservation; to modify, limit, or otherwise alter the extent of this grant; and to establish and enact such laws relating to the establishment or conduct of Cigarette Retail Shops within the Reservation as it may deem desirable.

## SUBCHAPTER 2. LICENSING GENERALLY AND FEES

3.07.110 License Required

Any Member operating a Cigarette Retail Shop on the Reservation must first apply for and receive a cigarette retail license from the Tribe. Expired or revoked cigarette retail licenses must be renewed before operation of a Cigarette Retail Shop may continue. No member shall operate a Cigarette Retail Shop on the Puyallup Indian reservation without a cigarette retail license. Any individual selling cigarettes on Trust Land must first obtain a cigarette retail license.

3.07.120 Eligible Persons

Any Member, eighteen (18) years of age or older, who agrees to comply with this chapter and other applicable laws of the Tribe, and whom is not otherwise prohibited from operating a Cigarette Retail Shop on the Reservation may obtain a cigarette retail license.

3.07.130 License Term

Each license shall expire twelve (12) months from the effective date of the cigarette retail license.

3.07.140 License Processing Fee

Application for a cigarette retail license shall be made by submitting a nonrefundable processing fee of one hundred dollars (\$100) to the Department. The processing fee shall be credited toward the licensee's annual cigarette retail license fee.

3.07.150 Annual Licensing Fee

An annual license fee of two hundred fifty dollars (\$250) shall be imposed upon every person operating a Cigarette Retail Shop on the Reservation. Such fees must be paid in full to the Department prior to the issuance of a cigarette retail license. Failure to pay such fee shall be cause to withhold a cigarette retail license.

3.07.160 Nonpayment Penalty

Failure to obtain a cigarette retail license, or failure to pay the license fee within thirty (30) days after the day on which it is due, shall render the business subject to a penalty of fifty percent (50%) of the amount of the licensing fee for the first month of delinquency and an additional penalty of ten percent (10%) for each succeeding month of delinquency, provided, that the total penalty shall not exceed the license fee. These nonpayment penalties shall not be credited toward the licensee's annual cigarette retail license fee.

3.07.160 Duplicate License Fee

A duplicate license must be obtained in the event that the original license is lost, stolen or destroyed. A duplicate license fee of fifty dollars (\$50) shall be imposed upon every issuance of a duplicate license.

### SUBCHAPTER 3. LICENSING PROCEDURES

3.07.210 Application – Required Forms and Documents

The completion of the following forms and documents shall be required of all persons applying for a cigarette retail license:

- (1) An Application Form;
- (2) An Acknowledgement Form, should the trust property be held in trust for

multiple beneficial owners, proper acknowledgement of the proposed use of the land must be obtained from all beneficial owners;

- (3) Evidence of Trust status;
- (4) Evidence of a Bureau of Indian Affairs approved lease, should the trust property be leased by someone other than a beneficial owner of the trust property; and
- (5) Evidence of tribal affiliation.

The Tribe understands that a Bureau of Indian Affairs approved lease may initially take a couple of months to obtain. To account for the time requirement for processing leases with the Bureau of Indian Affairs, the Department is authorized to issue a three (3) month temporary licenses to applicants proactively seeking lease approval. At the end of this period, the temporary license will expire and evidence of a Bureau of Indian Affairs approved lease must be provided to the Department to obtain an annual cigarette retail license. No temporary licenses will be provided after June 1, 2005.

#### 3.07.220 Application – Information Required

The following information shall be required of all persons applying for a cigarette retail license.

- (1) The name of the applicant;
- (2) The Tribal affiliation of the applicant;
- (3) The date of the application;
- (4) The anticipated date of commencement of business;
- (5) The name of the business if other than the name of the applicant;
- (6) The name and address of the beneficial owner(s) of the real property where the business is (or will be located);
- (7) The names and addresses of all agents and managers currently employed at the applicant's business locations for which a cigarette retail license is sought;
- (8) The location of all distribution and all sales locations, or offices, or other places of business on and off the reservation of any applicant, beneficial owner, manager, and officer of said business;
- (9) The signature of the applicant; and
- (10) Such other information as the Council may from time to time require.

### 3.07.230 Application Denial

An application shall be denied if:

- (1) The Department does not timely receive all of the required forms and documents;
- (2) The Department does not timely receive all applicable fees;
- (3) The applicant's license has been suspended or revoked and the matter relating to the suspension or revocation has not been resolved;
- (4) The applicant is currently in nonconformance with Tribal law; or
- (5) The applicant is otherwise prohibited from operating a Cigarette Retail Shop on the Puyallup Indian reservation.

An application may be resubmitted at a later date, when any such defect is corrected and eligibility is established.

### 3.07.240 License Renewal

All licenses shall be renewed, and the annual license fee shall be due thirty (30) days prior to the expiration of a current cigarette retail license. The Department is authorized, but not required, to mail forms for license renewal. Failure of any business to receive such form shall not excuse the business from applying for and securing the cigarette retail license, nor from paying of the licensing fee due.

### 3.07.250 License Transfer

Licenses issued pursuant to the terms of this chapter shall not be assignable or transferable in the event of sale or transfer of such business to other ownership or for any other purpose.

### 3.07.260 License Posting

Every cigarette retail business shall keep and post the cigarette retail license issued to the business pursuant to this chapter on the premises of the business.

### 3.07.270 Separate Licenses for Multiple Locations

A separate license must be obtained for each Cigarette Retail Shop location.

### 3.07.280 Dual Businesses at the Same Location

A separate license shall be required for the sale of liquor and separate business license shall be required for the sale of any other goods sold at the location of a licensed

Cigarette Retail Shop.

3.07.290 Compliance with Tribal Zoning Regulations

The address of the real property where the business is (or will be located) must comply with Tribal zoning regulations.

SUBCHAPTER 4. CIGARETTE TAXATION

3.07.310 Administration and Collection

The Puyallup Tribal Council grants the authority for administration and collection of the Tribal cigarette tax to the Department.

3.07.320 Applicability

The Tribal cigarette tax shall apply to the retail sale of cigarettes by Cigarette Retail Shops and Tribal Enterprises.

3.07.330 Amount of Tax

The Tribal cigarette tax shall be eleven dollars seventy five cents (\$11.75) per carton of two hundred (200) cigarettes and shall increase dollar for dollar with subsequent increases in the State cigarette tax.

3.07.340 Exemption – Gross Proceeds Tax

All sales of cigarettes shall be exempt from the Tribe's gross proceeds tax or any other Tribal tax.

3.07.350 Record of Revenue Required

Each Cigarette Retail Shop shall be required to maintain accurate and complete records of revenue obtained from the sale of cigarettes. Such records must be delivered to the Department on a quarterly basis. The records must be delivered in a clear and concise form.

Required Disclosures:

- (1) Gross revenue from the sale of twenty (20) cigarette packs of cigarettes;
- (2) Pack sales of twenty (20) cigarette packs;
- (3) Gross revenue from the sale of twenty-five (25) cigarette packs of cigarettes; and



- (4) Pack sales of twenty-five (25) cigarette packs.

The Department retains the right to request such records at any time deemed necessary for the administration of this chapter. The Cigarette Retail Shop will be provided one (1) business week to produce such records in these instances.

3.07.360 Proceeds Sharing

The Tribe will share the cigarette tax proceeds with the State of Washington in accordance with the Compact.

3.07.370 Essential Government Services

Tribal cigarette tax revenue shall be used for essential government services, as defined by the Compact.

## SUBCHAPTER 5. COMPLIANCE PROGRAM

3.07.410 Purpose

The purpose of the compliance program is to monitor compliance with Tribal law and with the Cigarette Compact.

3.07.415 Applicability

By engaging in the retail sale of cigarettes, both Cigarette Retail Shops and Tribal Enterprises are subject to the compliance program.

3.07.420 Administration

The Department is responsible for the administration of this program. The Department, at its option and subject to State approval, may contract with an independent third party to perform compliance checks.

3.07.425 Compliance Checks

In general, the Compliance program will monitor and investigate Cigarette Retail Shops and Tribal Enterprises in regard to:

- (1) Sales to minors;
- (2) Sales of unstamped cigarettes;
- (3) Sale of cigarettes to resellers;

- (4) Sales of cigarettes obtained from unauthorized sources;
- (5) Pricing compliance;
- (6) Mail order and internet sales; and
- (7) Other requirements and limitations of Tribal law.

3.07.430 Sale to Minors Prohibited

Neither Cigarette Retail Shops nor Tribal Enterprises shall sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen (18) years.

3.07.431 Sale to Minors Prohibition Sign to be Posted

Each Cigarette Retail Shop and Tribal Enterprise shall display a sign concerning the prohibition of tobacco sales to minors.

Such signs shall:

- (1) Be posted so that it is clearly visible to anyone purchasing tobacco products from the licensee;
- (2) Be designed and produced by the Department to read: 'THE SALE OF TOBACCO PRODUCTS TO PERSONS UNDER THE AGE OF 18 IS STRICTLY PROHIBITED BY TRIBAL LAW. PHOTO IDENTIFICATION IS REQUIRED FOR PURCHASE OF TOBACCO PRODUCTS'; and
- (3) Be provided free of charge by the Department.

3.07.432 Age Identification Requirement

Where there may be a question of a person's right to purchase or obtain tobacco products by reason of age, the retailer, or agent thereof, shall require the purchaser to present picture identification that shows the purchaser's age and bears his or her signature.

3.07.433 Sale to Minors – Penalty

The sale of cigarettes to a minor or failure of a Cigarette Retail Shop or Tribal Enterprise to post the required prohibition sign shall result in the below defined immediate penalties:

- (1) The first offense shall result in a monetary penalty of one hundred dollars (\$100);

- (2) The second offense shall result in a monetary penalty of three hundred dollars (\$300);
- (3) The third offense shall result in license suspension for six (6) months and monetary penalty of one thousand dollars (\$1000);
- (4) The fourth offense shall result in license revocation for one (1) year and monetary penalty of one thousand five hundred dollars (\$1500); and
- (5) The fifth offense shall result in license revocation for five (5) years and monetary penalty of two thousand five hundred dollars (\$2500).

3.07.440 Sale of Unstamped Cigarettes

Neither Cigarette Retail Shops nor Tribal Enterprises shall sell unstamped cigarettes.

3.07.441 Stamp Compliance

Cigarettes sold by Cigarette Retail Shops and Tribal Enterprises must bear the proper Tribal stamp. Two types of stamps will exist, one for packages containing twenty (20) cigarettes, and one for packages containing twenty-five (25) cigarettes. Each pack of cigarettes sold must bear the proper Tribal stamp, a twenty (20) stamp for the sale of twenty (20) packs and a twenty-five (25) stamp for the sale of twenty-five (25) packs.

3.07.442 Sale of Unstamped or Improperly Stamped Cigarettes – Penalty

The sale of unstamped cigarettes or improperly stamped cigarettes by either a Cigarette Retail Shop or a Tribal Enterprise shall result in the below defined immediate penalties:

- (1) The first offense shall result in a monetary penalty of five hundred dollars (\$500);
- (2) The second offense shall result in license suspension for six (6) months and a monetary penalty of one thousand dollars (\$1000);
- (3) The third offense shall result in license revocation for one (1) year, a monetary penalty of one thousand five hundred dollars (\$1500) and subject to criminal prosecution;
- (4) The fourth offense shall result in license revocation for three (3) years, a monetary penalty of two thousand five hundred dollars (\$2500) and subject to criminal prosecution; and
- (5) The fifth offense shall result in license revocation for five (5) years, a monetary penalty of five thousand dollars (\$5,000) and subject to criminal prosecution.

3.07.450 Sale of Cigarettes to Reseller Prohibited

Neither Cigarette Retail Shops nor Tribal Enterprises shall knowingly sell cigarettes to a cigarette reseller.

3.07.451 Resale Prohibition Sign to be Posted

Each Cigarette Retail Shop and Tribal Enterprise shall display a sign concerning the prohibition of resale of cigarettes purchased from a Cigarette Retail Shop.

Such signs shall:

- (1) Be posted so that it is clearly visible to anyone purchasing cigarettes from the licensee;
- (2) Be designed and produced by the Department to read: 'THE RESALE OF CIGARETTES PURCHASED FROM A TRIBALLY LICENSED CIGARETTE RETAILER IS STRICTLY PROHIBITED'; and
- (3) Be provided free of charge by the Department.

3.07.452 Sale of Cigarettes to Reseller – Penalty

The sale of cigarettes to a cigarette reseller by a Cigarette Retail Shop or a Tribal Enterprise shall result in the below defined immediate penalties:

- (1) The first offense shall result in a monetary penalty of five hundred dollars (\$500);
- (2) The second offense shall result in license suspension for six (6) months and a monetary penalty of one thousand dollars (\$1000);
- (3) The third offense shall result in license revocation for one (1) year, a monetary penalty of one thousand five hundred dollars (\$1500);
- (4) The fourth offense shall result in license revocation for three (3) years, a monetary penalty of two thousand five hundred dollars (\$2500) and subject to criminal prosecution; and
- (5) The fifth offense shall result in license revocation for five (5) years, a monetary penalty of five thousand dollars (\$5,000) and subject to criminal prosecution.

3.07.460 Sale of Cigarettes Obtained from Unauthorized Sources

Neither Cigarette Retail Shops nor Tribal Enterprises shall sell cigarettes obtained from unauthorized sources.

3.07.461 Authorized Sources

A Cigarette Retail Shop is permitted to purchase cigarettes at wholesale only from:

- (1) State licensed wholesalers; or
- (2) The Tribe, acting as a wholesaler.

3.07.462 Sale of Cigarettes Obtained from Unauthorized Sources – Penalty

The sale of cigarettes obtained from unauthorized sources by a Cigarette Retail Shop or a Tribal Enterprise shall result in the below defined immediate penalties:

- (1) The first offense shall result in license revocation for one (1) year and a monetary penalty of one thousand dollars (\$1000);
- (2) The second offense shall result in license revocation for two (2) years and a monetary penalty of one thousand five hundred dollars (\$1500);
- (3) The third offense shall result in license revocation for three (3) years, a monetary penalty of two thousand five hundred dollars (\$2500) and subject to criminal prosecution; and
- (4) The fourth offense shall result in license revocation for five (5) years, a monetary penalty of five thousand dollars (\$5,000) and subject to criminal prosecution.

3.07.470 Pricing Compliance

The retail sale price of any cigarette must not be less than the price paid by the retailer for the cigarette, and such price must include the full amount of the cigarette tax imposed on the cigarette.

3.07.471 Sale of Cigarettes Below Minimum Price Requirement – Penalty

The sale of cigarettes below minimum price requirement by a Cigarette Retail Shop or a Tribal Enterprise shall result in the below defined immediate penalties:

- (1) The first offense shall result in a monetary penalty of one hundred dollars (\$100);
- (2) The second offense shall result in a monetary penalty of three hundred dollars (\$300);

- (3) The third offense shall result in license suspension for six (6) months and monetary penalty of one thousand dollars (\$1000);
- (4) The fourth offense shall result in license revocation for one (1) year and monetary penalty of one thousand five hundred dollars (\$1500); and
- (5) The fifth offense shall result in license revocation for five (5) years and monetary penalty of two thousand five hundred dollars (\$2500).

3.07.480 Sale by mail order or through the internet

Cigarette Retail Shops and Tribal Enterprises are strictly prohibited from engaging in mail order or the internet sale of cigarettes.

3.07.481 Sale of cigarettes by mail order or internet - Penalty

Sale of cigarettes by mail order or internet by a Cigarette Retail Shop or a Tribal Enterprise shall result in the below defined immediate penalties:

- (1) The first offense shall result in a license revocation for three (3) years, a monetary penalty of two thousand five hundred dollars (\$2500) and subject to criminal prosecution; and
- (2) The second offense shall result in a license revocation for five (5) years, a monetary penalty of five thousand dollars (\$5,000) and subject to criminal prosecution.

3.07.490 Failure or Refusal to Pay Monetary Penalties – Suspension of License

The failure or refusal to pay monetary penalties shall result in the immediate suspension of a cigarette retail license. A license will be suspended until the Department receives payment of the monetary penalties.

3.07.491 Collection of Information

Each Cigarette Retail Shop may be required from time to time to submit to a compliance review. Each Cigarette Retail Shop shall be required to provide, when directed by the Department, information and access that will enable the Department to determine whether the Shop is in compliance with the requirements of this Ordinance and Tribal law. Compliance reviews shall consist of a review, by the Department or by a third party, of the Cigarette Retail Shop's books and records, the Cigarette Retail Shop's premises, inventory and other items deemed necessary by the Tribe.

3.07.492 Failure or Refusal to Provide Required Information or Access – Penalty

The failure or refusal to provide required information or access by a Retail Cigarette Shop or Tribal Enterprise shall result in the below defined immediate penalties:

- (1) The first offense shall result in license suspension until compliance;
- (2) The second offense shall result in license suspension for one (1) year;
- (3) The third offense shall result in license revocation for three (3) years; and
- (4) The fourth offense shall result in license revocation for five (5) year.

SUBCHAPTER 6. ADMINISTRATIVE AND JUDICIAL PROCEDURE

3.07.510 Administrative Procedure

The Department shall follow the administrative procedure outlined below in events of apparent and actual violation:

- (1) Notice of apparent or actual violation: Penalties will be immediate and a written notice of apparent or actual violation will be provided to the licensee.
- (2) Determination by the Department: The Department shall provide the licensee with relevant documentation of the apparent or actual violation. The licensee shall have the opportunity to provide the Department with additional relevant information and shall have the opportunity to meet with the Department Director to review the claim. The Department shall consider all relevant information in making a final decision regarding the apparent or actual violation. The final decision must be made based on a preponderance of the evidence. Upon reaching a final decision the licensee shall be provided with written documentation of the Department's decision.
- (3) Discretion to reduce penalty: The Department Director shall have the authority to reduce the designated penalty if sufficient evidence is made available to the Director to show that the violation was incidental or unintentional.

3.07.520 Post-Deprivation Hearing

A cigarette retail licensee shall have the opportunity to appeal the Department's decision to suspend or revoke a cigarette retail license. Such appeals shall be heard the Puyallup Tribal Court at a post-deprivation hearing. The decision by the Puyallup

Tribal Court shall be final.

3.07.530 Judicial – Civil Enforcement

A decision by the Department may be appealed to the Puyallup Tribal Court. In addition, the Puyallup Tribal Court shall hear civil cases brought by the Tribe to enforce civil penalties prescribed under this chapter. The Puyallup Tribal Court's rules of civil procedure and other applicable court rules shall apply.

3.07.540 Judicial – Criminal Enforcement

A decision made by the Department shall authorize the Puyallup Tribal Prosecutor Office to criminally prosecute in instances where the penalty provides for criminal prosecution. The decision to prosecute will be at the discretion of the Tribal Prosecutor. The Department shall provide relevant information to the Prosecutor's Office. The Puyallup Tribal Court's rules of criminal procedure and other applicable court rules shall apply.

SUBCHAPTER 7. MISCELLANEOUS

3.07.610 Noncompliance – Report to Department

Any person who possesses knowledge of noncompliance shall provide such information to the Department. Failure to provide such information to the Department may subject that person to the penalties prescribed in this chapter and other Tribal ordinances as they may apply.

3.07.620 Noncompliance – Waiver of Privilege and Protection

Continued noncompliance with this chapter by any person will result in a waiver of the person's privileges and protection under this chapter.

3.07.630 Illegal Substances – Zero Tolerance

The Tribe has a zero tolerance policy with regard to illegal substances. Any illegal substances found on the premise or sold on the premise of a Cigarette Retail Shop shall result in the immediate revocation of a cigarette retail license.

3.07.640 Severability

If any provision of this chapter, or its application to any person or circumstance, is held invalid by the Puyallup Tribal Court, the remainder of this chapter shall remain in effect.



FILED  
COURT OF APPEALS  
DIVISION II

06 OCT 23 AM 10:24

NO. 35067-0-II

STATE OF WASHINGTON

COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

PAUL M. MATHESON,

Appellant,

v.

CHRISTINE GREGOIRE, Governor of  
the State of Washington; CINDI  
YATES, Director; GARY O'NEIL,  
Assistant Director; Washington State  
Department of Revenue;  
WASHINGTON STATE  
DEPARTMENT OF REVENUE; M.  
CARTER MITCHELL, Tobacco Tax  
Control Enforcement Program Manager;  
WASHINGTON STATE LIQUOR  
CONTROL BOARD; STATE OF  
WASHINGTON; CHAD R. WRIGHT,  
Cigarette Compact Department  
Administrator, Puyallup Tribe of  
Indians; and THE PUYALLUP TRIBE  
OF INDIANS,

Respondents.

DECLARATION OF  
MAILING

Candy Zilinskas, states and declares as follows:

I am a citizen of the United States of America and over 18 years of  
age and I am competent to testify to the matters set forth herein. On  
October 20, 2006, I provided a true and correct copy of Brief of State  
Respondents and this Declaration of Mailing sent US Mail Postage Prepaid  
via Consolidated Mail Service to:

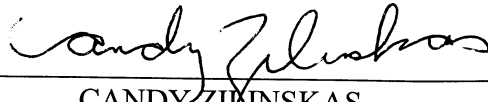
ORIGINAL

Robert E. Kovacevich  
Attorney at Law  
818 West Riverside Avenue, Suite 715  
Spokane, WA 99201-0995

John Howard Bell  
Law Office  
Puyallup Indian Tribe  
3009 Portland Ave.  
Tacoma, WA 98404

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 20<sup>th</sup> day of October, 2006, in Olympia, Washington.



---

CANDY ZILINSKAS  
Legal Assistant